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RECORD, CASE No. 15,300.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 923.

NELSON F. EVANS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 21, 1893.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 29, 1893.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, and Nelson F. Evans, defendant, No. 51, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 51. May sess., 1892, of indictments. District court U. States, E. dist. of Penna. The United States *vs.* Nelson F. Evans. Writ of error from the Supreme Court of the United States. Lodged in clerk's office district court U. States March 22nd, 1893.

On this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared William B. Spittall before me, a commissioner of the circuit court of the United States for the 3rd circuit, and makes oath that he delivered a true copy of the within citation to the Honorable William Butler, judge of the district court of the United States, eastern district of Pennsylvania.

WM. B. SPITTALL.

Sworn and subscribed to the 21st day of March, A. D. 1893.

[Seal Henry R. Edmunds, U. S. Commissioner, Philadelphia, Pa.]

HENRY R. EDMUNDS,
United States Commissioner in and for the Eastern District of Pennsylvania.

2 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein Nelson F. Evans is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

2½ [Endorsed:] No. 51. May sess., 1892, of indictments. United States district court, E. dist. of Penna. Citation & service. The United States *vs.* Nelson F. Evans. Citation on writ of error and proof of service. Lodged in the clerk's office March 22nd, 1893.

On this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared William B. Spittall before me, the subscriber, a commissioner of U. S. circuit court (3rd circuit), and makes oath that he delivered a true copy of the within citation to Ellery P. Ingham, U. S. district att'y.

W. B. SPITTALL.

Sworn to and subscribed the 21st day of March, A. D. 1893.

[Seal Henry R. Edmunds, U. S. Commissioner, Philadelphia, Pa.

HENRY R. EDMUNDS,
United States Commissioner in and for the Eastern District of Pennsylvania.

3 No. 51.

In the Supreme Court of the United States.

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States:

The petition of Nelson F. Evans respectfully represents—

That he was indicted in the United States district court for the eastern district of Pennsylvania upon three bills of indictment, entitled respectively as of May sessions, 1892, Nos. 49, 50, and 51, which bills were treated as parts of one indictment.

That he filed special demurrers to the several counts in each indictment not nol-prossed by the United States, which demurrers were overruled, and that after having pleaded "not guilty" to said

indictments he was, after a trial by jury on the 5th, 6th, 7th, and 8th days of December, 1892, convicted upon all of said counts. Motions in arrest of judgment, with an assignment of special reasons, were filed, and, being respectively overruled, he was on the 16th day of December, A. D. 1892, sentenced under two of said bills to an aggregate term of imprisonment for seven years.

He respectfully represents that in overruling said special demurrers and the motions in arrest of judgment error was committed by the trial court, and that he has been prejudiced and greatly damaged thereby, and that it is his desire to prosecute a writ of error to be addressed to the said district court for the eastern district of
4 Pennsylvania, in accordance with section 5 of the act of Congress entitled "An act to establish circuit courts of appeal and to define and regulate jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891.

He further represents that he has filed of record with the clerk of the court below a separate assignment of errors prior to the presentation of this petition, in accordance with the rules of the Supreme Court of the United States.

Wherefore he prays that a writ of error may be allowed in the premises, directed to the district court of the United States for the eastern district of Pennsylvania, and that a citation may be issued, returnable within thirty days upon the entry of security in whatever sum may be directed.

And he will ever pray, &c.

NELSON F. EVANS,
By HAMPTON L. CARSON, *Of Counsel.*

5 UNITED STATES OF AMERICA, *ss:*

District Court of the United States for the Eastern District of Pennsylvania, May Sessions, 1892. No. 51.

Assignments of Error.

1. The court erred in overruling the demurrer filed to the first count in said indictment, said demurrer being based upon the ground that it contained simply an averment of a wilful misapplication of the moneys, funds, and credits of the Spring Garden National bank by the defendant, as a director, with the intent to defraud the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

2. The court erred in refusing to arrest the judgment upon the first count, the motion in arrest of judgment being based upon the ground that said count was defective, in that it contained simply an averment of the wilful misapplication of the moneys, funds, and credits of the Spring Garden National bank by the defendant, as a director, with the intent to defraud the association, without averring how the application was made, and that it was an unlawful one,

and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

6 3. The court erred in overruling the demurrer filed to the second count in said indictment, said demurrer being based upon the ground that said count simply charged a conspiracy, and failed to set forth by sufficient and necessary descriptive averments either that the object of the conspiracy was a crime against the United States, there being no specifications of the means of said alleged misapplication, and, further, because there was no averment that the means resorted to in pursuance of said alleged conspiracy were a crime against the United States, nor was there any specification or description of the means themselves.

4. The court erred in refusing to arrest judgment upon the second count in said indictment, the motion in arrest of judgment being based upon the ground that said count contained simply an averment of conspiracy, and failed to set forth by sufficient and necessary descriptive averments either that the object of the conspiracy was a crime against the United States, there being no specifications of the means of said alleged misapplication, and, further, because there was no averment that the means resorted to in pursuance of said alleged conspiracy were a crime against the United States, nor was there any specification or description of the means themselves.

5. The court erred in overruling the demurrer filed to the third count of said indictment, said demurrer being based upon the

7 ground that said count charged the defendant with aiding and abetting the president of the Spring Garden National bank to misapply the funds, credits, and moneys of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

6. The court erred in refusing to arrest the judgment upon the third count of said indictment, the motion in arrest of judgment being based upon the ground that said count was defective, in that it charged the defendant with aiding and abetting the president of the Spring Garden National bank to misapply the funds, credits, and moneys of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

7. The court erred in overruling the demurrer filed to the fourth count of said indictment, said demurrer being based upon the ground that said count was defective, in that it charged the defendant with aiding and abetting the cashier of the Spring Garden National bank to misapply the funds, moneys, and credits of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

8 8. The court erred in refusing to arrest the judgment upon the fourth count in said indictment, the motion in arrest of judgment being based upon the ground that said count was defective, in that it charged the defendant with aiding and abetting the cashier of the Spring Garden National bank to misapply the funds, moneys, and credits of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

9. The court erred in overruling the demurrer filed to the 5th, 10th, and 11th counts in said indictment, said demurrer being based upon the ground that there was no averment in said counts that the check given by the defendant upon the Keystone National bank, dated March 17, 1891, for $15,333.35, to the order of the Spring Garden National bank, was presented by the latter to the former for payment, and that payment thereof was refused, and that the bank thereby became a loser.

10. The court erred in refusing to arrest the judgment moved for upon counts 5, 10, and 11, said motion in arrest of judgment being based on the ground that the said counts were bad, in that they contained no averment that the check given by the defendant upon the Keystone National bank, dated March 17, 1891, for
9 $15,333.35, to the order of the Spring Garden National bank, was presented by the latter to the former for payment, and that payment thereof was refused, and that the bank thereby became a loser.

11. The court erred in overruling the demurrer filed to the 6th, 7th, 8th, 9th, 12th, and 13th counts in said indictment, said demurrer being based upon the ground that said counts contained no averment that the said checks therein described were not paid, or that the respective endorsements thereon that they were paid through the clearing-house were false, or that the said endorsements were made or permitted to be made by the defendant with the knowledge of their falsity and with the intent to defraud the bank, and that the Spring Garden bank was damaged by the transaction.

12. The court erred in refusing to arrest the judgment moved for upon counts 6, 7, 8, 9, 12, and 13, said motion in arrest of judgment being based upon the ground that said counts were defective, in that they contained no averment that the said checks therein described were not paid, or that the respective endorsements thereon that they were paid through the clearing-house were false, or that the said endorsements were made or permitted to be made by the defendant with the knowledge of their falsity and with the intent to defraud the bank, and that the Spring Garden bank was damaged by the transaction.

13. The court erred in overruling the demurrer filed to
10 counts 16 and 20, said demurrer being based upon the ground that said counts were bad, in that they contained no averment that the president or cashier of the Spring Garden National Bank, in discounting as president or as cashier the various notes

therein described, acted in excess of their powers or outside of their regular duties, nor did they contain any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper, nor did they contain any averment that said discounts were procured by any fraudulent means, nor did they contain any averment that the said defendant was at the time of the said discounts insolvent or knew himself to be so.

14. The court erred in declining to arrest the judgment moved for upon counts 16 and 20, said motion in arrest of judgment being based upon the ground that said counts were defective, in that they contained no averment that the president or cashier of the Spring Garden National bank, in discounting as president or as cashier the various notes therein described, acted in excess of their powers or outside of their regular duties, nor did they contain any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper, nor did they contain any averment that said discounts were procured by any fraudulent means, nor did they contain any averment that the said defendant was at the time of the said discounts insolvent or knew himself to be so.

11 15. The court erred in overruling the demurrer filed to counts 14, 15, and 16, said demurrer being based upon the ground that said counts were defective, in that they contained no averment that the said defendant did not receive said notes as agent for collection or to secure their renewal and subsequently failed to account for the same to the said Spring Garden National bank either as to the proceeds or renewals; and, further, because they contained no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security, value, or renewal notes therefor; and, further, because they contained no averment that the bank had been in any manner a loser thereby.

16. The court erred in refusing to arrest the judgment upon counts 14, 15, and 16, said motion in arrest of judgment being based upon the ground that said counts were defective, in that they contained no averment that the said defendant did not receive said notes as agent for collection or to secure their renewal, and subsequently failed to account for the same to the said Spring Garden National bank either as to the proceeds or renewals; and, further, because they contain no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security, value, or renewal notes therefor; and, further, because they contain no averment that the bank had been in any manner a loser thereby.

12 17. The court erred in overruling the demurrer filed to counts 22, 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, and 152, said demurrer being based on the ground that said counts were defective, in that they contained no averment that the overdrafts complained of were not according to the usual and customary course of banking or contrary to the practice or contract between the said defendant and the Spring Garden National bank, or that they were not loans, and that interest was not

charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

18. The court erred in refusing to arrest the judgment moved for upon counts 22, 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, and 152, said motion in arrest of judgment being based upon the ground that said counts were defective, in that they contained no averment that the overdrafts complained of were not according to the usual and customary course of banking or contrary to the practice or contract between the said defendant and the Spring Garden National bank, or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

13 19. The court erred in overruling the demurrer filed to counts Nos. 70, 71, 86, 137, 138, and 152, said demurrer being based upon the ground that said counts were bad because they contained no averment that the said orders or charges against the said Nelson F. Evans, which on their face as displayed in said counts were drawn and signed by Francis W. Kennedy, as president, were made with the knowledge or consent or with the subsequent assent of the defendant, or that he had obtained or did obtain any moneys thereon.

20. The court erred in refusing to arrest the judgment moved for upon counts Nos. 70, 71, 86, 137, 138, and 152, said motion in arrest of judgment being based upon the ground that said counts were defective, in that they contained no averment that the said orders or charges against the said Nelson F. Evans, which on their face as displayed in said counts were drawn and signed by Francis W. Kennedy, as president, were made with the knowledge or consent or with the subsequent assent of the defendant, or that he had obtained or did obtain any moneys thereon.

NELSON F. EVANS,
By HAMPTON L. CARSON, *Of Counsel.*

14 No. 51.

Know all men by these presents that we, Charles T. Evans, as principal; Shepley W. Evans, and the City Trust, Safe Deposit & Surety Co., a corporation duly chartered under the laws of the State of Pennsylvania, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars ($500), to be paid to the said United States of America, their certain attorney; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the sessions of a criminal court held at Philadelphia, in the eastern district of Pennsylvania, in the month of November, A. D. 1892, in a prosecution in said court by the United States of America against one Nelson F. Evans, of said district,

yeoman, upon certain bill of indictment, entitled May sessions, 1892, and numbered 51, upon which, after sundry other proceedings, issue was joined and a trial had before the Honorable William S. Butler, United States district judge for the eastern district of Pennsylvania, and a jury, upon the 8th day of December, 1892, and verdict of guilty rendered against the said Nelson F. Evans, and he was sentenced, upon said bill No. 51, to a term of two years' imprisonment in the Eastern penitentiary of the Commonwealth of Pennsylvania, said term to commence at and from the expiration of the previous term of imprisonment upon indictment
15 No. 50 of May sessions, 1892, and the said Nelson F. Evans conceiving that manifest errors have happened, to his great prejudice, and having presented his petition for a writ of error to the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, and having obtained an allowance thereof and a citation directed to the clerk of the United States district court for the eastern district of Pennsylvania, commanding him to return the record, so that it be at a Supreme Court of the United States, to be holden at Washington, within —days from the date thereof: Now, the condition of the within obligation is such that if the said Nelson F. Evans shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES T. EVANS. [SEAL.]
S. W. EVANS. [SEAL.]
[SEAL.] THE CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA,
By CHARLES W. SWAIN, *President.*

Sealed and delivered in the presence of—
CHARLES S. MORGAN.
FRANK E. BOYLE.

Attest: JAMES T. LYND, *Secretary.*

Approved by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

I hereby certify that Charles T. Evans, Shepley W. Evans, and "The City Trust, Safe Deposit & Surety Co. of Philadelphia," the sureties above named, are good and sufficient for the full amount of the penalty of the bond.

Philadelphia, March 17, '93.

CHARLES S. LINCOLN,
Clerk of the District Court of the United States for the Eastern District of Pennsylvania.

16 In the District Court of the United States for the Eastern District of Pennsylvania.

Pleas before the honorable the judge of said court of May sessions, 1892. No. 51.

It is thus contained:

THE UNITED STATES OF AMERICA
vs.
NELSON F. EVANS. } Indictment.

Be it remembered that at a district court of the United States in and for the eastern district of Pennsylvania, holden at Philadelphia on the seventeenth day of May, A. D. 1892, before the Honorable William Butler, judge of said court, by the oaths of Harry W.
17 Jayne, Albert E. Bailey, Charles M. Billmeyer, James F. Dailey, Daniel W. Gratley, John C. Blank, Jacob K. Greisemer, Samuel Griffith, John N. Kline, Frank Kunkel, William R. Nicholson, William S. Russell, and Edward A. Wright, and by the affirmations of J. Watson Craft, William W. Harkness, Mahlon N. Kline, Milton Lewis, Charles Lukens, William R. Pechin, Frank J. Shirk, William H. Sproul, and Joseph Waite, good and lawful men of the said district, then and there empanneled and sworn or affirmed and charged to inquire for the said United States and for the body of the said district—

It is presented as follows:

18 In the District Court of the United States for the Eastern District of Pennsylvania, May Session, 1892. No. 51.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations respectfully do present that heretofore, to wit, on the eighth day of May, A. D. 1891, one Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, being then and there a director of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently, and willfully, and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association for his own use, benefit, and advantage, to wit, the sum of one hundred thousand dollars, contrary to the form of the act of Congress in such case made and pro-
19 vided and against the peace and dignity of the United States of America.

(2.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently conspire with one Francis W. Kennedy and one Harry H. Kennedy (he, the said Francis W. Kennedy, being then and there president of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided, and he, the said Harry H. Kennedy, being then and there cashier thereof) to commit an offence against the United States—that is to say, to wilfully misapply a large amount of moneys, funds, and credits then and there belonging to the said national banking association, to wit, the sum of one hundred thousand dollars, then and there with intent in
20 them, the said Nelson F. Evans and the said Francis W. Kennedy and the said Harry H. Kennedy, to injure and defraud the said national banking association for their own use, benefit, and advantage; and afterwards, to wit, upon the day and year aforesaid, the said Francis W. Kennedy, as such president, and the said Harry H. Kennedy, as such cashier, did then and there knowingly, wilfully, unlawfully, and fraudulently misapply a large amount of the moneys, funds, and credits then and there belonging to the said national banking association, to wit, the sum of one hundred thousand dollars, with intent to injure and defraud the said national banking association for the use, benefit, and advantage of them, the said Francis W. Kennedy and Harry H. Kennedy and the said Nelson F. Evans, so conspiring as aforesaid, contrary to the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(3.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being
21 then and there president of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such cases made and provided, and

which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association, to wit, one hundred thousand dollars, for the use, benefit, and advantage of the said Nelson F. Evans, then & there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(4.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet
22 one Harry H. Kennedy (the said Harry H. Kennedy being then and there cashier of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association, to wit, one hundred thousand dollars, for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(5.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the 8th day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, be-
23 ing then and there a director of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania (which said association had been heretofore created and organized under and by virtue of the acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district),

did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association for his own use, benefit, and advantage, to wit, the sum of fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars, in the manner and by the means following—that is to say, that he, the said Nelson F. Evans, being then and there a director as aforesaid, did then and there deposit and cause to be deposited and placed to his credit in the said national banking association a certain check or order as follows, to wit:

No. 846. PHILADELPHIA, *March* 17, 1891.

Keystone National bank

Pay to the order of Spring Garden National bank fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars.

$15,333.35 NELSON F. EVANS.

[On margin of check:] Nelson F. Evans.

The said sum of fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars being in excess of all the sums and amounts
24 which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Keystone National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Keystone National bank, and by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden National bank and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out of and obtain from the said bank the said sum of $15,333.35 for his own use, benefit, and advantage, as he, the said Nelson F. Evans, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(6.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, at the district aforesaid and within the jurisdiction of this court, being then and there a director of a certain national banking association then and there known
25 and designated as the Spring Garden National bank, in the State of Penna. (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national

banking association misapply certain of the moneys, funds, and credits of the said national banking association for his own use, benefit, and advantage, to wit, the sum of five thousand dollars, in the manner and by the means following—that is to say, that he, the said Nelson F. Evans, being then and there a director as aforesaid, did then and there deposit and cause to be deposited and placed to his credit in the said national banking association a certain check or order as follows, to wit:

No. —. PHILADELPHIA, *February* 11, 1891.

The Keystone National bank

Pay to myself or bearer five thousand dollars.
$5,000. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house (35)."

26 The said sum of five thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Keystone National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Keystone National bank, and by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden National bank and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out of and obtain from the said bank the said sum of $5,000 for his own use, benefit, and advantage, as he, the said Nelson F. Evans, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(7.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman,

27 at the district aforesaid and within the jurisdiction of this court, being then and there a director of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association for his own use, benefit, and advantage, to wit, the

sum of ten thousand dollars, in the manner and by the means following—that is to say, that he, the said Nelson F. Evans, being then and there a director as aforesaid, did then and there deposit and cause to be deposited and placed to his credit in the said national banking association a certain check or order as follows, to wit:

No. —. PHILADELPHIA, *February* 11, 1891.

The Fourth Street National bank

Pay to myself or bearer ten thousand dollars.

$10,000. NELSON F. EVANS.

28 Endorsed: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house (35)."

The said sum of ten thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Fourth Street National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Fourth Street National bank, and by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden bank and was thereby enabled to and did thereafter, to wit, upon the day & year aforesaid, draw out and obtain from the said bank the said sum of $10,000 for his own use, benefit, and advantage, as he, the said Nelson F. Evans, then and there well knew, contrary to the form of the act of Congress in such case made and provided and *and* against the peace and dignity of the United States of America.

(8.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, upon the eighth day of May, A.

29 D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, in the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F.

Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association—that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national
30 banking association misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of ten thousand dollars, in the manner and by means following—that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be received as a deposit and placed to the credit of the said Nelson F. Evans in the said bank a certain check or order as follows, to wit:

No. —. PHILADELPHIA, *May* 8, 1891.

The Fourth Street National bank

Pay to myself or bearer ten thousand dollars.
$10,000. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house (35)."

The said sum of ten thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Fourth Street National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Fourth Street National bank.

And by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then —
31 there obtain a false credit upon the books of the said Spring Garden National bank, and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out and obtain from the said bank the said sum of $10,000 for his own use, benefit, and advantage, as he, the said Kennedy, and the said Nelson F. Evans, so aiding and abetting as aforesaid, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(9.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, upon the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy (the said Harry H. Kennedy being then and

there cashier of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at
32 Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association—that is to say, the said Harry H. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid and within the jurisdiction of this court, being then and there cashier of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of ten thousand dollars, in the manner and by the means following—that is to say, that he, the said Harry H. Kennedy, as such cashier, did then and there cause to be received as a deposit and placed to the credit of the said Nelson F. Evans in the said bank a certain check or order as follows, to wit:

No. —. PHILADELPHIA, *May* 8, 1891.

The Fourth Street National bank

Pay to myself or bearer ten thousand dollars.
33 $10,000. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house (35)."

The said sum of ten thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the Fourth Street National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Fourth Street National bank.

And by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden National bank, and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out and obtain from the said bank the said sum of $10,000 for his own use, benefit, and advantage, as he, the said Kennedy, and the said Nelson F. Evans, so aiding and abetting as aforesaid, then and there well knew, contrary to the

form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

34 (10.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudently aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been heretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association—that is to say, the said Francis

35 W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of fifteen thousand three hundred and thirty-three $\frac{35}{100}$ dollars, in the manner and by the means following—that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be received as a deposit and place to the credit of the said Nelson F. Evans in the said bank a certain check or order as follows, to wit:

No. 846. PHILADELPHIA, *Mar.* 17, 1891.

Keystone National bank

Pay to the order of Spring Garden National bank fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars.

$15,333.35. NELSON F. EVANS.

The said sum of fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars being in excess of all sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from,

and have paid out of the moneys and funds of the said Key-
36 stone National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Keystone National bank.

And by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden National bank, and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out of and obtain from the said bank the said sum of $15,333.35 for his own use, benefit, and advantage, as he, the said Kennedy, and the said Nelson F. Evans, so aiding and abetting as aforesaid, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(11.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy (the said Harry H. Kennedy being then and there cashier of a certain national banking association then and
there known and designated as the Spring Garden National
37 bank, in the State of Penna., which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association—that is to say, the said Harry H. Kennedy, late of the district —, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid and within the jurisdiction of this court, being then and there cashier of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of fifteen thousand three hundred and thirty-three $\frac{35}{100}$ dollars, in the manner and by the means following—that is to say, that he, the said Harry H. Kennedy, as such cashier, did then and there cause to be received as a deposit and
placed to the credit of the said Nelson F. Evans in the said
38 bank a certain check or order as follows, to wit:

No. 446. PHILADELPHIA, *Mar.* 17, 1891.

Keystone National bank

Pay to the order of Spring Garden National bank fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars.

$15,333.35. NELSON F. EVANS.

The said sum of fifteen thousand three hundred thirty-three $\frac{35}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Keystone National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Keystone National bank.

And by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden National bank, and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out and obtain from the said bank the said sum of $15,333.35 for his own use, benefit, and advantage, as he, the said Kennedy, and the said Nelson F. Evans, so aiding and abetting as aforesaid, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

39 (12.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, upon the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association—that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, and within the
40 jurisdiction of this court, being then and there president of the said national banking association aforesaid, did know-

ingly, unlawfully, and fraudulently and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of five thousand dollars, in the manner and by the means following—that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be received as a deposit and placed to the credit of the said Nelson F. Evans in the said bank a certain check or order as follows, to wit:

No. —. PHILADELPHIA, *May* 3, 1891.

The Keystone National bank

Pay to myself or bearer five thousand dollars.
$5,000. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house (35)."

The said sum of five thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Keystone National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the Keystone National bank, and by means of which said check or order so received and deposited as aforesaid he, said Nelson F. Evans, did then and there obtain a false credit upon the books of the said Spring Garden National bank, and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out of and obtain from the said bank the said sum of $5,000 for his own use, benefit, & advantage as he, the said Kennedy, and the said Nelson F. Evans, so aiding and abetting
41 as aforesaid, then & there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(13.)

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, upon the eighth day of May, A. D. 1891, the said Nelson F. Evans, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy (the said Harry H. Kennedy being then and there cashier of a certain national banking association then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such

case made and provided) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and de-
42 fraud the said national banking association—that is to say, the said Harry H. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, and within the jurisdiction of this court, being then and there cashier of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of five thousand dollars, in the manner and by the means following—that is to say, that he, the said Harry H. Kennedy, as such cashier, did then and there cause to be received as a deposit and placed to the credit of the said Nelson F. Evans in the said bank a certain check or order as follows, to wit:

No. —. . PHILADELPHIA, *May* 8, 1891.

The Keystone National bank

Pay to myself or order five thousand dollars.
$5,000. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house (35)."

The said sum of five thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans,
43 was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Keystone National bank, as he, the said Nelson F. Evans, then and there well knew, and which said check or order was not paid by the said Keystone National bank, and by means of which said check or order so received and deposited as aforesaid the said Nelson F. Evans did then and there obtain a false credit upon the books of the said Spring Garden National bank and was thereby enabled to and did thereafter, to wit, upon the day and year aforesaid, draw out of and obtain from the said bank the said sum of $5,000 for his own use, benefit, and advantage, as he, the said Kennedy, and the said Nelson F. Evans, so aiding and abetting as aforesaid, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

44 14. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Ken-

nedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there to wilfully misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the day and year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president, as aforesaid, of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of seventy-five hundred dollars, in the manner and by the means following; that is to say; a certain promissory note, dated, to wit, Philadelphia, November 10, 1890, made and drawn by a certain person, to wit, A. B. Nettleton, for the sum of, to wit, seventy-five hundred dollars, due and payable March 13, 1891, at the said bank, had been theretofore, to wit, upon the day and year aforesaid, discounted by the said bank, and was then and there overdue and unpaid, and held by the said bank as and for funds and credits, as aforesaid; whereupon, the said Francis W. Kennedy did then and there, with intent to injure and defraud the said national banking association, knowingly, unlawfully and fraudulently wilfully misapply the same, in that he then and there surrendered and delivered the same to the said Nelson F. Evans, without receiving therefor for the said bank the said sum of seventy-five hundred dollars, or any part thereof; and the said Nelson F. Evans did then and there knowingly and unlawfull aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply the said funds and credits of the said national banking association, as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

45 15. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid

and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the day and year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president as aforesaid, of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of seventy-eight hundred & thirty-three $\frac{35}{100}$ dollars, in the manner and by the means following; that is to say: a certain promissory note, dated, to wit, Philadelphia, November 10, 1890, made and drawn by a certain person, to wit, A. B. Nettleton, for the sum of, to wit, seventy-eight hundred & thirty-three $\frac{35}{100}$ dollars, due and payable March 13, 1891, at the said bank, had been theretofore, to wit, upon the day and year aforesaid, discounted by the said bank, and was then and there overdue and unpaid, and held by the said bank as and for funds and credits as aforesaid; whereupon, the said Francis W. Kennedy did then and there, with intent to injure and defraud the said national banking association, knowingly, unlawfully and fraudulently wilfully misapply the same, in that he then and there surrendered and delivered the same to the said Nelson F. Evans, without receiving therefor for the said bank the said sum of seventy-eight hundred thirty-three $\frac{35}{100}$ dollars, or any part thereof; and the said Nelson F. Evans did then and there knowingly and unlawfully aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply the said funds and credits of the said national banking association, as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

46–49 16. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this

court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy, (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there to wilfully misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the day and year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president as aforesaid, of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say: a certain promissory note, dated, to wit, Philadelphia, November 25, 1890, made and drawn by a certain person, to wit, A. B. Nettleton, for the sum of, to wit, five thousand dollars, due and payable March 28, 1891, at the said bank, had been theretofore, to wit, upon the day and year aforesaid, discounted by the said bank, and was then and there held by the said bank as and for funds and credits, as aforesaid; whereupon, the said Francis W. Kennedy did then and there, with intent to injure and defraud the said national banking association, knowingly, unlawfully and fraudulently wilfully misapply the same, in that he then and there surrendered and delivered the same to the said Nelson F. Evans, without receiving therefor for the said bank the said sum of five thousand dollars, or any part thereof; and the said Nelson F. Evans did then and there knowingly and unlawfully aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply the said funds and credits of the said national banking association, as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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50 20. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district

aforesaid, at the district aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided), then and there to wilfully misapply a certain large amount of the moneys, funds and credits then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, and for the use, benefit and advantage of the said Nelson F. Evans, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of fifteen thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there receive and discount, with the moneys and funds of the said national banking association, a certain promissory note made and drawn by one, to wit, Nelson F. Evans, dated, to wit, Philadelphia, May 5, 1891, for the sum of, to wit, $15,000, due and payable Aug. 8, 1891, at the said bank, and which said promissory note is as follows:

$15,000. PHILADELPHIA, *May* 5, 1891.

Three months after date I promise to pay to the order of the Spring Garden National bank fifteen thousand dollars without defalcation for value received.

No. —. Due 8, 8, '91. NELSON F. EVANS,
1050 *Drexel Building.*

[On margin of check:] (Picture of a female with sword drawn and uplifted shield.)

which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, and which said note was not paid upon maturity or at any other time; and by reason of the same the said national banking association, suffered loss of the said sum of fifteen thousand dollars, with intent in him, the said Nelson F. Evans so aiding and abetting as aforesaid, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case

made and provided, and against the peace and dignity of the United States of America.

51 21. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $5,000 as aforesaid by means of and upon a certain check or order, dated March 28, 1891, for the sum of $5,000 made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4042. PHILADELPHIA, *March* 28, 1891.

The Spring Garden National bank

Pay to the order of Spring Garden Nat'l bank five thousand dollars.
$5,000.00. NELSON F. EVANS.

[On margin of check:] Nelson F. Evans.

The said sum of five thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $5,000, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $5,000 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans had no right and title to the same; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

52–68 22. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as afore-

said, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of seven thousand six hundred & three $\frac{17}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $7,603.17 as aforesaid by means of and upon a certain check or order, dated Feb. 9, 1891, for the sum of $7,603.17 made and drawn upon the said national banking association, by Nelson F. Evans, a further description of which said check or order cannot be here set out for the reason that it has since been returned to the said defendant, Nelson F. Evans.

The said sum of seven thousand six hundred & three $\frac{17}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $7,603.17, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $7,603.17 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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69–71 39. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in

such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of ten hundred & ninety-one $\frac{23}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,091.23 as aforesaid by means of and upon a certain check or order, dated Mch 7th, 1891, for the sum of $1,091.23, made and drawn upon the said national banking association, by Nelson F. Evans; which check or order was as follows:

No. 4031. PHILADELPHIA, *Mch* 7, 1891.

The Spring Garden National bank

Pay to the order of Fidelity Ins., Tr. & S. D. Co. ten hundred and ninety-one $\frac{23}{100}$ dollars.

1,091.23. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Fidelity Insurance, Trust & Safe Deposit Co. Rob't M. Scott, ass't treas. Received payment through the clearing-house (20)."

[On margin of check:] Nelson F. Evans.

The said sum of ten hundred & ninety-one $\frac{23}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,091.23, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,091.23 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans had no right and title to the same; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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72–79 42. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking

association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of one thousand dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,000 as aforesaid by means of and upon a certain check or order, dated M'ch 14th, 1891, for the sum of $1,000, made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4034. PHILADELPHIA, *M'ch 14th*, 1891.

The Spring Garden National bank

Pay to the order of ex'or est. H. W. Pitkin, dec'd, one thousand dollars.

$1,000. NELSON F. EVANS.

Endorsed: "The Philadelphia Trust, Safe Deposit and Insurance Company, ex'or est. H. W. Pitkin. E. D. Schooley, ass't treas. For deposit to the credit of the Philadelphia Trust, Safe Deposit & Ins. Co. Received payment through the clearing-house M'ch 16, 1891.

[On margin of check:] Nelson F. Evans.

The said sum of one thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,000, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,000 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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80 50. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A.

D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association the said sum of $5,000 as aforesaid by means of and upon a certain check or order, dated April 4th, 1891, for the sum of $5,000 made and drawn upon the said national banking association, by Nelson F. Evans which check or order was as follows:

No. 4046. PHILADELPHIA, *April 4th*, 1891.

The Spring Garden National bank

Pay to the order of Fidelity Trust, Safe Dep. I. Co. five thousand dollars.

$5,000.00. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Fidelity Insurance, Trust & Safe Deposit Co. Chas. Atherton, treasurer. Received payment through the clearing-house April 4th, 1891 (2).

[On margin of check:] Nelson F. Evans.

The said sum of five thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $5,000 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $5,000 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

81–83 51. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as afore-

said, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of fifty-five hundred & sixty-three $\frac{25}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $5,563.25 as aforesaid by means of and upon a certain check or order, dated April 9th, 1891, for the sum of $5,563.25, made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4047. PHILADELPHIA, *April* 9, 1891.

The Spring Garden National bank

Pay to the order of E. R. Watson, cash'r, fifty-five hundred & sixty-three $\frac{25}{100}$ dollars.

$5,563.25. (C.) NELSON F. EVANS.

Endorsed: E. R. Watson, c'r Northern National Bank of Philadelphia.

[On margin of check:] Nelson F. Evans.

The said sum of fifty-five hundred & sixty-three $\frac{25}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $5,563.25, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $5,563.25, so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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84–86 54. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently, and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $5,000 as aforesaid by means of and upon a certain check or order, dated April 13th, 1891, for the sum of $5,000 made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4049. PHILADELPHIA, *April* 13, 1891.

The Spring Garden National bank

Pay to the order of Spring G'd'n Nat'l bank (C) five thousand dollars.

$5,000.00. NELSON F. EVANS.

[On margin of check:] Nelson F. Evans.

The said sum of five thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $5,000 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $5,000 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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87-90 57. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of one thousand dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,000 as aforesaid by means of and upon a certain check or order, dated April 15th, 1891, for the sum of $1,000 made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4051. PHILADELPHIA, *April* 15, 1891.

The Spring Garden National bank

Pay to the order of W. L. Dubois, tr., one thousand dollars.
$1,000.00. NELSON F. EVANS.

Endorsed: "For deposit to the credit of the Philadelphia Trust, Safe Deposit & Ins. Co. Received payment through the clearing-house Apr. 16, 1891."

[On margin of check:] Nelson F. Evans.

The said sum of one thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,000, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,000 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans had no right and title to the same; contrary to the form of the act of Congress in such case made and pro-

vided, and against the peace and dignity of the United States of America.

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91–93 61. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of one hundred & thirty $\frac{12}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $138.12 as aforesaid by means of and upon a certain check or order, dated April 21st, 1891, for the sum of $138.12 made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4055. PHILADELPHIA, *April 21st*, 1891.

The Spring Garden National bank

Pay to the order of Fidelity Ins., Tr. & Safe Dep. Co. one hundred & thirty-eight $\frac{12}{100}$ dollars.

$138.12. NELSON F. EVANS.

Endorsed: For deposit to the credit of Fidelity Insurance, Trust & Safe Deposit Co. Chas. Atherton, treasurer. Received payment through the clearing-house (20).

[On margin of check:] Nelson F. Evans.

The said sum of one hundred & thirty-eight $\frac{12}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $138.12, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $138.12 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way

secured, and the said Nelson F. Evans, had no right and title to the sum: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

* * * * * * *

94–99 64. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district), did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of three hundred & one $\frac{67}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $301.67 as aforesaid by means of and upon a certain check or order, dated May 1st, 1891, for the sum of $301.67 made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 4058. PHILADELPHIA, *May* 1*st*, 1891.

The Spring Garden National bank

Pay to the order of Penn. National bank three hundred & one & $\frac{67}{100}$ dollars.

$301.67. NELSON F. EVANS.

Endorsed: Received payment through the clearing-house (nine).

[On margin of check:] Nelson F. Evans.

The said sum of three hundred & one $\frac{67}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $301.67, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $301.67 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson

F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

* * * * * * *

109 70. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of sixteen hundred & eighty-three $\frac{50}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,683.50 as aforesaid by means of and upon a certain check or order, dated May 1st, 1891, for the sum of $1,683.50 made and drawn upon the said national banking association, by Francis W. Kennedy, president, which check or order was as follows:

$1,683.50. PHILADELPHIA, *May 1st*, 1891.

The Spring Garden National bank

Pay to Penn. Trust Co. or bearer sixteen hundred & eighty-three $\frac{50}{100}$ dollars.

Charge N. F. Evans.

F. W. K., *Pt.*

The said sum of sixteen hundred eighty-three $\frac{50}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,683.50 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,683.50 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and

title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

101 71. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of five hundred sixteen $\frac{25}{100}$ dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $516.25 as aforesaid by means of and upon a certain check or order, dated May 1st, 1891, for the sum of $516.25 made and drawn upon the said national banking association, by Francis W. Kennedy, president, which check or order was as follows:

$516.25. PHILADELPHIA, *May* 1, 1891.

The Spring Garden National bank

Pay to interest or bearer five hundred & sixteen $\frac{25}{100}$ dollars.
Charge N. F. Evans.

F. W. K., *Pt.*

The said sum of five hundred sixteen $\frac{25}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $516.25 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $516.25 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

102–104 72. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of two thousand & ten dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $2,010 as aforesaid by means of and upon a certain check or order, dated April 1st, 1891, for the sum of $2,010 made and drawn upon the said national banking association, by Nelson F. Evans which check or order was as follows:

$2,010. PHILADELPHIA, *April 1st*, 1891.

One month (without grace) after date I promise to pay to the order of Francis W. Kennedy two thousand & ten dollars, at the Spring Garden National bank, without defalcation, value received.

No. —. Due ——. NELSON F. EVANS.

Endorsed: Francis W. Kennedy, for collection and credit the Fidelity Insurance, Trust and Safe Deposit Co. Received payment through the clearing-house (20).

The said sum of two thousand & ten dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $2,010 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $2,010 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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105 & 106 75. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of twenty-two hundred & fifty dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $2,250 as aforesaid by means of and upon a certain check or order, dated Feb. 16, 1891, for the sum of $2,250, made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

$2,250.00. SAN FRANCISCO, *Feb.* 16, 1891.

At ten days' sight pay to the order of Wells, Fargo & Co. twenty-two hundred and fifty dollars, value received, and charge to account of—

By ISREAL W. KNOX, *F. Ag't.*

To B. A. Mitchell, Jr., sec't'y, No. 1050 Drexel building, Philadelphia Pa.

Endorsed: Pay Tradesmen's National bank, Phila., or order for collection for account of Wells, Fargo & Co. Received payment through the clearing-house (14).

[Written across the face of check:] Accepted. Payable at Spring Garden National bank. Nelson F. Evans.

The said sum of twenty-two hundred & fifty dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $2,250, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $2,250 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no

way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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107–109 77. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of fifteen hundred dollars, in the manner and by the means following: that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,500 as aforesaid by means of and upon a certain check or order, dated M'ch 23, 1891, for the sum of $1,500, made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 307. PHILADELPHIA, *Mch* 23, 1891.

Spring Garden National bank

Pay to cash (C) or bearer fifteen hundred dollars.
$1,500*00*. NELSON F. EVANS, *Treas.*,
Per M.

Endorsed: "F. W. K."

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

The said sum of fifteen hundred dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,500 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,500 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the re-

payment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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110 & 111 80. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of fifteen hundred dollars, in the manner and by the means following: that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,500 as aforesaid by means of and upon a certain check or order, dated April 4, 1891, for the sum of $1,500, made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. —. PHILADELPHIA, *Apl* 4, 1891.

Spring Garden National bank

Pay to cash (C) or bearer fifteen hundred dollars.
$1,500. NELSON F. EVANS, *Tr.*

Endorsed: F. W. K.

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

The said sum of fifteen hundred dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,500, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,500, so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the re-

payment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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112 82. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of fifteen hundred dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,500 as aforesaid by means of and upon a certain check or order, dated April 25, 1891, for the sum of $1,500 made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 312. PHILADELPHIA, *April* 25, 1891.

Spring Garden National bank

Pay to cash or bearer fifteen hundred dollars.

$1,500. NELSON F. EVANS, *Treas.*,
Per MITCHELL.

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

The said sum of fifteen hundred dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly, and fraudulently devising and intending to defraud the said association of the said sum of $1,500, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,500 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the re-

payment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

113&114 83. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of one thousand dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $1,000 as aforesaid by means of and upon a certain check or order, dated April 30th, 1891, for the sum of $1,000 made and drawn upon the said national banking association, by Nelson F. Evans; which check or order was as follows:

No. 313. PHILADELPHIA, *April 30th*, 1891.

Spring Garden National bank

Pay to cash, or bearer one thousand dollars.

$1,000. NELSON F. EVANS, *Treas.*,
Per MITCHELL.

Endorsed: "F. W. K."

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

The said sum of one thousand dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $1,000 although as he, the said Nelson F. Evans, then and there well knew, the said sum of $1,000 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the re-

payment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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115 85. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of twenty-five hundred dollars, in the manner and by the means following; that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $2,500 as aforesaid by means of and upon a certain check or order, dated April 30th, 1891, for the sum of $2,500, made and drawn upon the said national banking association, by Nelson F. Evans, which check or order was as follows:

No. 314. PHILADELPHIA, *Apr. 30th*, 1891.

Spring Garden National bank

Pay to Spring Garden Nat'l bank or order twenty-five hundred dollars.

$2,500. NELSON F. EVANS.

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

The said sum of twenty-five hundred dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $2,500, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $2,500 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the re-

payment thereof to the said association was in no way secured, and the said Nelson F. Evans, had no right and title to the same: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

116 86. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there a director of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; (which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided; and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district,) did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, for his own use, benefit and advantage, to wit, the sum of four hundred & two $\frac{50}{100}$ dollars, in the manner and by the means following: that is to say, that he the said Nelson F. Evans, being then and there a director, as aforesaid, did then and there draw out of and obtain from the said national banking association, the said sum of $402.50 as aforesaid by means of and upon a certain check or order, dated May 1, 1891, for the sum of $402.50, made and drawn upon the said national banking association, by Francis W. Kennedy, president; which check or order was as follows:

$402.50. PHILADELPHIA, *May* 1, 1891.

The Spring Garden National bank

Pay to Penn Trust Co. or bearer four hundred & two $\frac{50}{100}$ dollars. Charge N. F. Evans, treas.

F. W. K., *Pt.*

The said sum of four hundred & two $\frac{50}{100}$ dollars being in excess of all the sums and amounts which he, the said Nelson F. Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said national banking association, he, the said Nelson F. Evans, then and there unlawfully, wickedly and fraudulently devising and intending to defraud the said association of the said sum of $402.50, although as he, the said Nelson F. Evans, then and there well knew, the said sum of $402.50 so drawn out and paid as aforesaid, had not been deposited with the said national banking association by him, the said Nelson F. Evans, and the repayment thereof to the said association was in no way secured, and the said Nelson F. Evans had no right and title to the same: contrary to the form of the act of Congress in such case made and

provided, and against the peace and dignity of the United States of America.

117 87. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy, (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

No. 4042. PHILADELPHIA, *March* 28, 1891.

The Spring Garden National bank

Pay to the order of Spring Garden National bank five thousand dollars.

$5,000.00. NELSON F. EVANS.

[On margin of check:] Nelson F. Evans.

118 The said sum of $5,000 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $5,000, although as he, the said Francis W. Ken-

nedy, and the said Nelson F. Evans then and there well knew, the said sum of $5,000, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, wilfully and unlawfully aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

119 88. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of seventy-six hundred & three $\frac{17}{100}$ dollars, in the manner and by the means following: that is to say, that he, the said Francis W. Kennedy as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; a further description of which said check or order cannot be here

set out for the reason that it has since been returned to the said defendant Nelson F. Evans.

120–152 The said sum of $7,603.17 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $7,603.17, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $7,603.17, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, wilfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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153 105. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this

court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of ten hundred & ninety-one $\frac{23}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. —. PHILADELPHIA, *March 7th*, 1891.

The Spring Garden National bank

Pay to the order of Fidelity Ins., Tr. & S. D. Co. ten hundred and ninety-one $\frac{23}{100}$ dollars.

$1,091.23. NELSON F. EVANS.

Endorsed: "For deposit to the credit of Fidelity Insurance, Trust & Safe Deposit Co. Robert M. Scott, ass't treas. Received payment through the clearing-house (20)."

[On margin of check:] Nelson F. Evans.

154–158 The said sum of $1,091.23 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,091.23, although as he, the said Francis W. Kennedy and the said Nelson F. Evans then and there well knew, the said sum of $1,091.23, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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159 108. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid,

do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of one thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

No. 4034. PHILADELPHIA, *Mch 14th*, 1891.

The Spring Garden National bank

Pay to the order of ex'rs est. H. W. Pitkin, dec'd, one thousand dollars.

$1,000. NELSON F. EVANS.

Endorsed: "The Philadelphia Trust, Safe Deposit and Insurance Company. Ex'rs est. H. W. Pitkin. E. D. Schooley, ass't treas. For deposit to the credit of the Philadelphia Trust, Safe Deposit & Ins. Co. Received payment through the clearing-house. Mar. 16, 1891."

[On margin of check:] Nelson F. Evans.

160–174 The said sum of $1,000 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy unlawfully, wickedly and fraudulently devising and in-

tending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,000, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $1,000, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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175 116. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did

then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

No. 4046. PHILADELPHIA, *April 4th*, 1891.

The Spring Garden National bank

Pay to the order of Fidelity Trust, Safe Dep. & I. Co. five thousand dollars.

$5,000. NELSON F. EVANS.

Endorsed: For deposit to the credit of Fidelity Insurance, Trust & Safe Deposit Co. Chas. Atherton, treasurer. Received payment through the clearing-house (2). April 4, 1891.

[On margin of check:] Nelson F. Evans.

176 The said sum of $5,000 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $5,000, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $5,000, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

177 117. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said associa-

tion had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of fifty-five hundred & sixty-three $\frac{25}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. 4047. PHILADELPHIA, *April 9th*, 1891.

The Spring Garden National bank

Pay to the order of E. R. Watson, cashier (C), fifty-five hundred & sixty-three $\frac{25}{100}$ dollars.

$5,563.25. NELSON F. EVANS.

Endorsed: E. R. Watson, c'r Northern National Bank of Philadelphia.

[On margin of check:] Nelson F. Evans.

178–182 The said sum of $5,563.25 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $5,563.25, although as he, the said Francis W. Kennedy and the said Nelson F. Evans then and there well knew, the said sum of $5,563.25, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly,

wilfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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183 129. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of five thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. 4049. PHILADELPHIA, *April* 13, 1891.

The Spring Garden National bank

Pay to the order of Sp. Gd'n Nat'l bank five thousand (C) dollars.
$5,000. NELSON F. EVANS.

[On margin of check:] Nelson F. Evans.

184–188 The said sum of $5,000 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $5,000, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $5,000, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, wilfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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189 123. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such cases made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and

with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of one thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

No. 4051. PHILADELPHIA, *April* 15, 1891.

The Spring Garden National bank

Pay to the order of W. L. Du Bois, tr., one thousand dollars.
$1,000. NELSON F. EVANS.

Endorsed: For deposit to the credit of the Philadelphia Trust, Safe Deposit & Ins. Co. Received payment through the clearing-house April 16, 1891.

[On margin of check:] Nelson F. Evans.

190–197 The said sum of $1,000 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,000, although as he, the said Francis W. Kennedy and the said Nelson F. Evans then and there well knew, the said sum of $1,000, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy then and there president as aforesaid, knowingly, unlawfully and fraudulently, to wilfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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198 127. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this

court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of one hundred & thirty-eight $\frac{12}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. 4055. PHILADELPHIA, *April* 21*st*, 1891.

The Spring Garden National bank

Pay to the order of Fidelity Ins., Tr. & Safe Dep. Co. one hundred & thirty-eight $\frac{12}{100}$ —.

$138.12. NELSON F. EVANS.

Endorsed: For deposit to the credit of Fidelity Insurance, Trust & Safe Deposit Co. Chas. Atherton, treas. Received payment through the clearing-house (20).

[On margin of check:] Nelson F. Evans.

199–203 The said sum of $138.12 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $138.12, although as he, the said Francis W. Kennedy and the said Nelson F. Evans then and there well knew, the said sum of $138.12, so paid as aforesaid, had not been deposited, and was not there on deposit with the said na-

tional banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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204 130. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of three hundred & one $\frac{67}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

No. 4058. PHILADELPHIA, *May* 1*st*, 1891.

The Spring Garden National bank

Pay to the order of Penn National bank three hundred one $\frac{67}{100}$ dollars.

$301.67. NELSON F. EVANS.

Endorsed: Received payment through the clearing-house (nine).

[On margin of check:] Nelson F. Evans.

205–215 The said sum of $301.67 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $301.67, although as he, the said Francis W. Kennedy and the said Nelson F. Evans then and there well knew, the said sum of $301.67, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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216 136. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to mis-

apply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent to him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of two thousand & ten dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

$2,010. PHILADELPHIA, *April* 1*st*, 1891.

One month (without grace) after date I promise to pay to the order of Francis W. Kennedy two thousand and ten dollars at the Spring Garden Nat'l bank, without defalcation, value received.

No. —. Due ——. NELSON F. EVANS.

Endorsed: Francis W. Kennedy. For collection and credit. The Fidelity Insurance, Trust & Safe Deposit Co. Received payment through the clearing-house (20).

217 The said sum of $2,010 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $2,010, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $2,010, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association: contrary to the form of the act

of Congress in such case made and provided, and against the peace and dignity of the United States of America.

218 137. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business in Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of sixteen hundred & eighty-three $\frac{50}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Francis W. Kennedy, president, which said check or order was as follows:

$1,683.50. PHILADELPHIA, *May 1st*, 1891.

The Spring Garden National bank

Pay to Penn Trust Co. or bearer sixteen hundred & eighty-three $\frac{50}{100}$ dollars.

Charge N. F. Evans.

F. W. K., *Pt.*

219 The said sum of $1,683.50 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,683.50, although as he, the said

Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $1,683.50, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

220 138. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of five hundred & sixteen $\frac{25}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Francis W. Kennedy, president, which said check or order was as follows:

$516.25. PHILADELPHIA, *May* 1, 1891.

The Spring Garden National bank

Pay to interest or bearer five hundred & sixteen $\frac{25}{100}$ dollars.
Charge N. F. Evans. F. W. K., *Pt.*

221–225 The said sum of $516.25 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $516.25, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $516.25, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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226 141. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then

and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of twenty-two hundred & fifty dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

$2,250.00. SAN FRANCISCO, *Feb.* 16, 1891.

At ten days' sight pay to the order of Wells, Fargo & Co. twenty-two hundred and fifty $\frac{00}{100}$ dollars, value received, and charge to account of—

By ISRAEL W. KNOX, *F. Agt.*

To B. A. Mitchell, sec't'y, No. 1050 Drexel building, Philadelphia, Pa.

Endorsed: Pay Tradesmen's National bank or order for collection for account of Wells, Fargo & Co. Received payment through clearing-house (14).

227–229 The said sum of $2,250 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $2,250, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $2,250, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association, contrary to the form of the act of

Congress in such case made and provided, and against the peace and dignity of the United States of America.

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230 143. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid, and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there willfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of fifteen hundred dollars, in the manner and by the means following: that is to say, that he, the said Francis W. Kennedy, as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. 307. PHILADELPHIA, *Mch* 23, 1891.

Spring Garden National bank

Pay to cash (C) or bearer fifteen hundred dollars.

$1,500. NELSON F. EVANS, *Treas.*,
Per M.

Endorsed: F. W. K.

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

231–235 The said sum of $1,500 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds

of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,500, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $1,500, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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236 146. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of fifteen hun-

dred dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. —. PHILADELPHIA, *Apr.* 4, 1891.

Spring Garden National bank

Pay to cash or bearer fifteen hundred dollars.
$1,500. NELSON F. EVANS, *Tr.*

Endorsed: F. W. K.

[On margin of check:] Spring Garden Nat'l bank, 12th & Spring Garden streets.

237–239 The said sum of $1,500 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,500, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $1,500, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, wilfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

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240 148. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the

Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of fifteen hundred dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. 312. PHILADELPHIA, *April* 25, 1891.

Spring Garden National bank

Pay to cash (C) or bearer fifteen hundred dollars.
$1,500. NELSON F. EVANS, *Treas.*,
Per MITCHELL.

[On margin of check:] Spring Garden Nat'l bank, 12th & Spring Garden streets.

241 The said sum of $1,500 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,500, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $1,500, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis

W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association: contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

242 149. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of one thousand dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans, which said check or order was as follows:

No. 313. PHILADELPHIA, *Apr.* 30, 1891.

Spring Garden National bank

Pay to cash or bearer one thousand dollars.

$1,000. NELSON F. EVANS, *Treas.*,
Per MITCHELL.

Endorsed: F. W. K.

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

243–245 The said sum of $1,000 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $1,000, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $1,000, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully, and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

* * * * * * *

246 151. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association, then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania; which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association

aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of twenty-five hundred dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy, as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Nelson F. Evans; which said check or order was as follows:

No. 314. PHILADELPHIA, *Apr.* 30, 1891.

Spring Garden National bank

Pay to Spring Garden Nat'l bank or order twenty-five hundred dollars.

$2,500. NELSON F. EVANS, *Tr.*

[On margin of check:] Spring Garden National bank, 12th & Spring Garden streets.

247 The said sum of $2,500 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $2,500, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $2,500, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

248 152. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully and fraudulently, aid and abet one Francis W. Kennedy (the said Francis W. Kennedy being then and there president of a certain national banking association,

then and there known and designated as the Spring Garden National bank, in the State of Pennsylvania: which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there wilfully to misapply a certain large amount of the moneys, funds and credits, then and there belonging to the said national banking association, for the use, benefit and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; that is to say, the said Francis W. Kennedy, late of the district aforesaid, heretofore, to wit, on the eighth day of May, in the year aforesaid, at the district aforesaid, and within the jurisdiction of this court, being then and there president of the said national banking association aforesaid, did knowingly, unlawfully, fraudulently and wilfully, and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of four hundred & two $\frac{50}{100}$ dollars, in the manner and by the means following; that is to say, that he, the said Francis W. Kennedy as such president, did then and there cause to be paid to and upon a certain check or order made and drawn by the said Francis W. Kennedy, president, which said check or order was as follows:

$402.50. PHILADELPHIA, *May* 1, 1891.

The Spring Garden Nat'l bank

Pay to Penn. Trust Co. or bearer four hundred & two $\frac{50}{100}$ dollars.
Charge N. F. Evans, tr.

F. W. K. *Pt.*

249 The said sum of $402.50 being in excess of all sums and amounts which the said Nelson F. Evans was then and there entitled to draw, and have paid out of the moneys and funds of the said national banking association, he, the said Francis W. Kennedy, unlawfully, wickedly and fraudulently devising and intending that the said Nelson F. Evans should appropriate and convert to his own use the said sum of $402.50, although as he, the said Francis W. Kennedy, and the said Nelson F. Evans then and there well knew, the said sum of $402.50, so paid as aforesaid, had not been deposited, and was not there on deposit with the said national banking association, by the said Nelson F. Evans, and was not then and there due and owing by the said association to the said Nelson F. Evans, and the repayment thereof to the said national banking association was not then and there in any way secured, and the said Nelson F. Evans had no manner and right of title to the same; and the said Nelson F. Evans did then and there knowingly, willfully and unlawfully, aid and abet the said Francis W. Kennedy, then and there president as aforesaid, knowingly, unlawfully and fraudulently, to

willfully misapply said moneys, funds and credits of the said national banking association as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

May 16th, 1892.

ELLERY P. INGHRAM,
U. S. Dist. Att'y.

250 *Summary (Indictment 51).*

Count 1. General count, misap-lication of the funds of a national banking association by a director thereof.

" 2. General count, conspiracy between officers of a national banking association (N. F. E., F. W. K., & H. H. K.) to wilfully misapply the moneys, funds, and credits thereof.

" 3. General count, aiding and abetting the president of a national banking association to misapply the moneys, funds, and credits thereof.

" 4. General count, aiding and abetting the cashier of a national banking association to misapply the moneys, funds, & credits thereof.

Counts 5 to 7, inclusive. Director of a national banking association misapplying moneys, &c., thereof (Keystone & Fourth Street checks).

" 8 to 10, " Aiding and abetting the president of a national banking association to misapply the funds thereof (Keystone and Fourth Street checks).

" 12 to 13, " Aiding and abetting the cashier of a national banking association to misapply the funds thereof (Keystone & Fourth Street checks).

" 14 to 19, " Aiding and abetting the president of a national banking association to misapply the funds thereof by surrendering the notes without receiving value therefor.

Count 20. Aiding and abetting the president of a national banking association to misapply the funds thereof by discounting an unsecured note (N. F. E. note, $15,000, discounted May 8, 1891).

Count 21. Director of national banking association misapplying moneys, &c., thereof—overdrafts (check 4042).

251

Counts 22 to 86, inclusive. Director of a national banking association misapplying the moneys, funds, & credits thereof—overdrafts (checks on personal & treasurer accounts).

Count 87. Aiding & abetting the president of a national banking association to misapply the funds thereof—overdrafts (check No. 4042).

Counts 88 to 152, inclusive. Aiding and abetting the president of a national banking association to misapply the funds thereof—overdrafts (checks on personal and treasurer accounts).

252 (Endorsement:) No. 51. May sessions, 1892. District court United States, eastern district of Pennsylvania. The United States of America *vs.* Nelson F. Evans. True bill. Harry W. Jayne, foreman. Indictment. Misapplication of the funds of a national banking association by an officer thereof. Aiding & abetting in the misapplication of the funds of a national banking association by an officer thereof. Conspiracy to misapply the funds of a national banking association by officers thereof. Filed May 17, 1892. Witnesses: James Glentworth, A. R. Barrett, Walter P. Faust, Harry C. Jones, Geo. W. Schouler, Wm. T. Thompson.

253 In the District Court of the United States in and for the Eastern District of Pennsylvania, of May Sessions, 1892.

UNITED STATES OF AMERICA)
vs.) No. 51.
NELSON F. EVANS.)

Defendant charged with willfully misapplying certain of the funds, &c., of a national banking association by a director thereof, &c.

And now, this fifth day of December, A. D. 1892, the United States of America, by Ellery P. Ingham, its attorney in and for the eastern district of Pennsylvania, comes and says that it will no further prosecute its said indictment against the said Nelson F. Evans as to the 17th, 18th, 19th, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 40th, 41st, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 52nd, 53rd, 55th, 56th, 58th, 59th, 60th, 62nd, 63rd, 65th, 66th, 67th, 68th, 69th, 73rd, 74th, 76th, 78th, 79th, 81st, 84th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 106th, 107th, 109th, 110th, 111th, 112th, 113th, 115th, 118th, 119th, 121st, 122nd, 124th, 125th, 126th, 128th, 129th, 131st, 132nd, 133rd, 134th, 135th, 139th, 140th, 142nd, 144th, 145th, 147th, 150th counts thereof.

ELLERY P. INGHAM, *U. S. Atty.*

Whereupon it is considered and adjudged by the court here that the said United States take nothing by the said bill as to the counts thereof above stated, and that the said defendant as to the same do go hence without day.

[Endorsed:] Indictment. No. 51. May sess., 1892. United States of America *vs.* Nelson F. Evans. *Nolle prosequi* as to certain

counts of the indictment herein stated. Judgment entered December 5, 1892. Ellery P. Ingham, U. S. attorney. Filed Dec. 5, 1892.

254 And afterwards, to wit, on the day and year last mentioned aforesaid, the defendant, Nelson F. Evans, by Hampton L. Carson, Esquire, his counsel, demurs to the remaining counts of the bill of indictment aforesaid (other than the twenty-first and eighty-seventh counts) in the words and figures following, to wit:

255 UNITED STATES OF AMERICA, *ss:*

District Court of the United States, Eastern District of Pennsylvania.

UNITED STATES, by Indictment,
v.
NELSON F. EVANS. } May Term, 1892. No. 51.

Demurrer to Counts in said Indictment.

And the said Nelson F. Evans, in his own proper person, personally cometh into court here, and, having heard the said indictment read, says that the first, second, third, and fourth counts in said indictment and the matters therein contained and set forth in manner and form as the same are therein stated and set forth are not sufficient in law, and that the said Nelson F. Evans is not bound by the law of the land to answer the same; that said counts in said indictment are defective in this:

The first count is defective in that it simply avers a wilful misapplication of the monies, funds, and credits of the Spring Garden National bank by the defendant, as a director, with the intent to defraud the association, without aver-ing how the application was made, and that it was an unlawful one, and without specify-
256 ing the means whereby said alleged misapplication was made and showing that they were unlawful.

The second count is defective in that it charges a conspiracy and fails to set forth by sufficint and necessary descriptive averments, either that the object of the conspiracy was a crime against the United States, there being no specification of the means of said alleged misapplication; and, further, there is no averment that the means resorted to in pursuance of said alleged conspiracy were crimes against the United States, nor is there any specification or description of the means themselves.

The third count is defective in that it charges the defendant with aiding and abetting the president of the Spring Garden National bank to misapply the funds, credits, and monies of the association without aver-ing how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

The fourth count is defective in that it charges the defendant with aiding and abetting the cashier of the Spring Garden National bank to misapply the funds, moneys, and credits of the association with-

out averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said
257 alleged misapplication was made and showing that they were unlawful.

And the said Nelson F. Evans, in his own proper person, &c., says that the fifth, tenth, and eleventh counts A are bad, in that there is no averment that the check given by the defendant upon the Keystone National bank, dated March 17th, 1891, for $15,333.35, to the order of the Spring Garden National bank, was presented by the latter to the former for payment, and that payment thereof was refused, and that the bank thereby became a loser.

And the said Nelson F. Evans, in his own proper person, &c., says that the sixth, seventh, eighth, ninth, twelfth, and thirteenth counts A are bad, in that there is no averment that the said checks therein described were not paid, or that the respective endorsements thereon that they were paid through the clearing-house were false, or that the said endorsements were made or permitted to be made by the defendant with the knowledge of its falsity and with the intent to defraud the bank, or that the Spring Garden bank was damaged by the transaction.

And the said Nelson F. Evans, in his own proper person, comes, &c., and says that counts A 20, B 14, C 59 and C 113, and A 16 and B 10 are bad, in that there is no averment that the president or cashier of the Spring Garden National bank, in discounting, as president or as cashier, the various notes therein described, acted
258 in excess of their powers or outside of their regular duties; nor is there any averment that the president or the cashier was not the duly authorized officers of the said bank to discount paper; nor is there any averment that said discounts were procured by any fraudulent means; nor is there any averment that the said Nelson F. Evans was at the time of the said discounts insolvent or knew himself to be so.

And the said Nelson F. Evans, in his own proper person, comes, &c., and says that counts A 14, 15, 16, B 8, 9, and 10, are defective, in that there is no averment that the said defendant did not receive said notes as agent for collection or to secure their renewal and subsequently failed to account for the same to the said Spring Garden National bank, either as to proceeds or renewals; and, further, because there is no averment that the bank did not, either at the time of surrender or any subsequent time, receive security value or renewal notes therefor; and, further, because there is no averment that the bank has been in any manner a loser thereby.

And the said Nelson F. Evans, in his own proper person, comes, &c., and says that counts A 22, 39, 42, 50, 51, 54, 57, 61, 72, 71, 74, 70, 75, 77, 80, 82, 83, 85, 86, 88, 105, 108, 116, 117, 120, 123, 127, 136, 138,
130, 137, 141, 143, 146, 148, 149, 151, 152, B 82, 99, 102, 110, 111,
259 114, 117, 121, 130, 132, 124, 131, 135, 137, 140, 142, 145, 143, 146, are defective, in that there is no averment that the overdrafts complained of were not according to the usual and customary course of banking or contrary to the practice and contract between the said defendant and the Spring Garden National bank,

or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

And the said Nelson F. Evans, in his own proper person, comes, &c., and says that counts Nos. 70, 71, 86, 137, 138, and 152 A and B 131, 132, and 146 are bad because there is no averment that the said orders or charges against the said Nelson F. Evans, which on their face as displayed in said counts were drawn and signed by Francis W. Kennedy as president, were made with the knowledge or consent or with the subsequent assent of the defendant, or that he had obtained or did obtain any monies thereon.

Wherefore he now prays judgement for want of a sufficient indictment in behalf of those accounts, and that by the court he may be discharged and dismissed from the said premises in this behalf.

NELSON F. EVANS,
HAMPTON L. CARSON,
Pro Defendant.

260 No. 51.

And afterwards, to wit, on the day and year last mentioned aforesaid, arguments having been heard and due consideration having been given thereto, the court is of opinion that the said counts of the United States before in their bill of indictment set forth and the matters therein contained are sufficient in law to have and maintain the bill of indictment of the said the United States aforesaid as to the said counts against the defendant, Nelson F. Evans, aforesaid.

261 No. 51.

Whereupon Alexander P. Colesberry, Esquire, the marshal of the said district, is commanded that he apprehend and take the body of the said Nelson F. Evans to answer the premises, which said indictment the said the Honorable William Butler, judge of the said the district court of the United States of America for the eastern district of Pennsylvania, afterwards, to wit, at the May sessions of the said the district court of the United States, held at Philadelphia, as aforesaid, on the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-two, did deliver here in court of record in form of law to be determined, and thereupon, at the November sessions of the district court of the United States for the eastern district of Pennsylvania, held as aforesaid on the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-two, before the said the Honorable William Butler, judge as aforesaid, comes the said Nelson F. Evans, appearing at the bar of the court in his proper person, who is committed to the said marshal, and he, the said Nelson F. Evans, concerning the premises in the said indictment above specified
262 and charged on him as above, being asked in what manner he would be acquitted thereof, says that he is not guilty thereof, and hereupon, for good or ill, he puts himself upon the country and Ellery P. Ingham, Esquire, attorney of the United

States of America for the eastern district of Pennsylvania, in this behalf does the like; therefore let a jury immediately come before the said the Honorable William Butler, the said judge above named here, by whom the truth of the matter will be better known and who have no affinity to the said Nelson F. Evans, to recognise upon their oaths and affirmations whether the said Nelson F. Evans be guilty of the premises in the indictment aforesaid above specified or not, because as well the said Ellery P. Ingham, Esquire, who prosecutes for the said the United States of America in this behalf as aforesaid, as the said Nelson F. Evans have put themselves upon that jury, and the jurors by the said marshal for this purpose impanelled and returned, to wit, Henry Small, Joseph M. Glick, Samuel M. Hertzler, Francis C. Dade, Sr.; Ephrain Kaufman, Harrison J. Boyer, Geo. S. Rowbotham, Charles Palmer, Thomas J. Bateman, Joseph M. Cranston, Howard M. Levering, A. Jackson Ely, being called, come, who, being chosen, tried, sworn, and affirmed to speak the truth of and upon the premises aforesaid in the indictment aforesaid above specified, do say, upon their oaths and affirmation, that the said Nelson F. Evans is guilty of the premises in the indictment aforesaid above specified in manner and form as
263 he stands charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 87, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, & 152 of the indictment; and thereupon, at the November sessions of the district court of the United States for the said district, held, as aforesaid, on the twelfth day of December, in the year of our Lord one thousand eight hundred and ninety-two, before the said the Honorable William Butler, judge as aforesaid, comes the said Nelson F. Evans, by his counsel, Hampton L. Carson, and says that the verdict aforesaid so as aforesaid found and rendered against the said Nelson F. Evans ought not to stand, and that judgment thereon ought to be arrested and that a new trial of the issue ought to be granted.

264 United States District Court, Eastern District of Pennsylvania, *ss.*

UNITED STATES *vs.* NELSON F. EVANS. } No. 51.

And now, this twelfth day of December, A. D. 1892, the said defendant comes into court and, through his counsel, moves for a new trial and assigns the following reasons in support of said motion:

First. Because in the order of proof evidence of the general condition of the bank was given before the defendant's connection with that condition had been specifically shown.

Second. Because evidence of the general condition of ruin of the bank was admitted from the lips of the receiver, who had no personal knowledge of his own before the defendant had been specifically connected with that condition except generally as a director.

Third. Because evidence of the indebtedness of other directors to the bank was allowed to be given without showing specifically that the defendant knew the state of their accounts.

Fourth. Because evidence to the present value of the Bunker Hill mine was excluded.

Fifth. Because evidence of the value of the mine in the years 1886, 1887, 1889, and 1890 was excluded.

Sixth. Because the receiver was not permitted to testify
265 on cross-examination as to the negotiations pending for the leasing of the mine.

Seventh. Because evidence of deposit slips and charges made against the account of the said defendant upon papers made by Mr. Kennedy, the president of the bank, were admitted in evidence, all of said papers being made in the absence of Mr. Evans and without showing that he had any knowledge thereof.

Eighth. Because evidence of the stamping of the check as paid through the clearing-house was admitted, said checks being handed back to the cashier *to* the receiving teller admittedly in the absence of Mr. Evans and without proof of his knowledge of the stamping and return of said checks.

Ninth. Because the checks which were altered without the authority or knowledge of Mr. Evans were admitted in evidence.

Tenth. Because the discount of the Nettleton notes upon May 7th, 1891, was not shown to be done with the knowledge of Mr. Evans, nor were the proceeds traced to his credit.

Eleventh. Because evidence from Mr. Drew, the bank examiner, of the form of the reports furnished to the Comptroller of the Currency and showing the existence of overdrafts as a regular item of the resources of the bank was excluded.

Twelfth. Because it was stated in the opening of the United States that Francis W. Kennedy, president, and H. H. Kennedy, cashier, had pleaded guilty because religious prejudice was introduced into the case.

266 UNITED STATES OF AMERICA, *ss:*

District Court of the United States, Eastern District of Pennsylvania, May Term, 1892.

UNITED STATES, by Indictment,
vs.
NELSON F. EVANS. } No. 50, 51.

Motion in Arrest of Judgment.

And the said Nelson F. Evans moves in arrest of judgment in the above case and assigns the following reasons in support of said motion:

The first count is defective in that it simply avers a willful misapplication of the monies, funds, and credits of the Spring Garden National bank by the defendant, as a director, with the intent to defraud the association, without aver-ing how the application was made

and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

The second count is defective in that it charges a conspiracy and fails to set forth by sufficient and necessary descriptive averments either that the object of the conspiracy was a crime against
267 the United States, there being no specification of the means of said alleged misapplication; and, further, there is no averment that the means resorted to in prosecution of said alleged conspiracy were crimes against the United States, nor is there any specification or description of the means themselves.

The third count is defective in that it charges the defendant with aiding and abetting the president of the Spring Garden National bank to misapply the funds, credits, and monies of the association, without averring how the application was made and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

The fourth count is defective in that it charges the defendant with aiding and abetting the cashier of the Spring Garden National bank to misapply the funds, monies, and credits of the association, without averring how the application was made and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

That the fifth, tenth, and eleventh counts A are bad in that there is no averment that the check given by the defendant upon the Keystone National bank, dated March 17th, 1891, for $15,333.35 to the order of the Spring Garden National bank was presented by the latter to the former for payment, and that payment thereof was refused, and that the bank thereby became a loser.

268 That the six-, seventh, eighth, ninth, twelfth, and thirteenth counts A are bad in that there is no averment that the said checks therein described were not paid, or that the respective endorsements thereon that they were paid through the clearing-house were false, or that the said endorsements were made or permitted to be made by the defendant with the knowledge of its falsity and with the intent to defraud the bank, or that the Spring Garden bank was damaged by the transaction.

That counts A 20, B 14, C 59, and C 113 and A 16 and B 10 are bad in that there is no averment that the president or cashier of the Spring Garden National bank in discounting as president or as cashier the various notes therein described acted in excess of their powers or outside of their regular duties, nor is there any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper, nor is there any averment that said discounts were procured by any fraudulent means, nor is there any averment that the said Nelson F. Evans was at the time of the said discounts insolvent or knew himself to be so.

That counts A 14, 15, 16, B 8, 9, and 10 are defective in that there is no averment that the said defendant did not receive said notes as

agent for collection or to secure their renewal, and subsequently failed to account for the same to the Spring Garden National
269 bank, either as to proceeds or renewals, and further because there is no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security value or personal notes therefor, and further because there is no averment that the bank has been in any manner a loser thereby.

That counts A 22, 39, 42, 50, 51, 54, 57, 61, 72, 71, 64, 70, 75, 77, 80, 82, 83, 85, 86, 88, 105, 108, 116, 117, 120, 123, 127, 136, 138, 130, 137, 141, 143, 146, 148, 149, 151, 152, B 82, 99, 102, 110, 111, 114, 117, 121, 130, 132, 124, 131, 135, 137, 140, 142, 143, 145, 146 are defective in that there is no averment that the overdrafts complained of were not according to the usual and customary course of banking, or contrary to the practice and contract between the said defendant and the Spring Garden National bank, or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

That counts Nos. 70, 71, 86, 137, 138, and 152 A and B 131, 132, and 146 are bad because there is no averment that the said orders or charges against the said Nelson F. Evans which on their face, as displayed in said counts, were drawn and signed by Francis W. Kennedy as president were made with the knowledge or consent or with the subsequent assent of the defendant, or that he had obtained or did obtain any monies thereon.

HAMPTON L. CARSON.

270 And thereupon, at the November sessions of the said district court of the United States, held, as aforesaid, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and ninety-two, before the said the Honorable William Butler, judge as aforesaid, comes the said Nelson F. Evans, appearing as aforesaid, who is committed as aforesaid; and thereupon, arguments having been heard and due consideration having been given to the subject, the court is of opinion that the verdict aforesaid ought to stand, and that a new trial ought not to — granted, but that judgment ought to be entered and given on said verdict.

Whereupon the motion for a new trial is refused and the motion in arrest of judgment overruled; and

Thereupon forthwith, all and singular the premises being seen and by the court here fully understood, it is considered and
271 adjudged that the defendant, Nelson F. Evans, pay to the United States a fine of two hundred dollars; that he be imprisoned and confined in the Eastern penitentiary of the Commonwealth of Pennsylvania for the term of two years, said term to commence at and from the expiration of such imprisonment as he shall or may undergo by reason of the sentence of the court this day imposed upon him under indictment No. 50, May sessions, 1892; that he pay the costs of prosecution and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the said Commonwealth.

272 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the record and proceedings in the said court in a certain criminal cause therein lately depending, to wit, indictment No. 51, May sessions, 1892, The United States of America against Nelson F. Evans, defendant, as full and entire as the same are now remaining among the records of the said court in my office, with copy of petition for writ of error, of the assignment of errors, and of the bond on writ of error.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-three, and in the one hundred and seventeenth year of the Independence of the United States

Seal of the District Court of the United States, E. D. Penna.

CHARLES S. LINCOLN,
Clerk District Court U. S.

[Endorsed:] U. S. district court. The United States of America *vs.* Nelson F. Evans. Indictment No. 51, May sess., 1892. Certified copy of record and proceedings of the district court.

Endorsed on cover: Case No. 15,300. E. Pennsylvania D. C. U. S. Term No., 923. Nelson F. Evans, plaintiff in error, *vs.* The United States. Filed April 21, 1893.

922

Office Supreme Court U. S.
FILED.
APR 24 1893
JAMES H. McKENNEY,
CLERK.

No. 1329 and No. 1330 Sessions, 1893.

IN THE

Supreme Court of the United States.

United States of America

vs.

Nelson F. Evans.

APPEALS OF NELSON F. EVANS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE CAUSES UPON THE ARGUMENT LIST.

HAMPTON L. CARSON,
RUFUS E. SHAPLEY,
In Support of Motion.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

United States of America		Sessions, 1893.
vs.	No.	and No.
Nelson F. Evans.		

APPEALS OF NELSON F. EVANS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE CAUSES UPON THE ARGUMENT LIST.

The motion is made in the above cases to have the causes advanced upon the argument list, so that an early day may be named upon which a hearing by this court can be had.

The reasons in support of this motion are briefly these: The defendant was charged upon two bills of indictment with willfully misapplying certain funds of a national banking association as a director thereof, under the provisions of section 5209 of the Revised Statutes of the United States.

Demurrers were filed to such counts of the indictments as were not *nol prossed*, and the demurrers were overruled. The defendant was then arraigned, and pleaded "not guilty," and, upon his conviction, a motion was made in each case in arrest of judgment, based substantially upon the same grounds as had been urged in support of the demurrers, prior to pleas pleaded. The reasons filed in support of the various demurrers, as well as those filed in support of the motions in arrest

of judgment, are substantially embodied in the assignments of errors.

The trial was had in the court below upon the fifth day of December, 1892, and continued from day to day until the eighth day of December, 1892, when the plaintiff in error was convicted in manner and form as he stood charged. Upon the same day motions for a new trial and in arrest of judgment were made. These were subsequently overruled and dismissed, and on the sixteenth day of December, A. D. 1892, he was sentenced under said indictments to an aggregate term of imprisonment for seven years. He is now actually in the penitentiary for the Eastern District of Pennsylvania serving out his sentence.

Petitions were presented in the above cases to the Honorable George Shiras, Jr., Associate Justice of the Supreme Court of the United States, praying that writs of error might be allowed, directed to the District Court of the United States for the Eastern District of Pennsylvania, and that a citation might be issued returnable within thirty days upon the entry of security in whatever sum might be directed. These prayers were duly granted, and writs of error issued in both the above cases, dated the thirteenth and seventeenth days of March, A. D. 1892, respectively, returnable within thirty days. Security was duly entered, and the writs and records have been duly returned to this court.

As it is manifest that a very large portion of the terms of imprisonment which the plaintiff in error is now undergoing would expire before the case could be reached in its regular course, it is respectfully submitted that the cause should be set down for an early day.

HAMPTON L. CARSON,
RUFUS E. SHAPLEY,
Of Counsel for Nelson F. Evans.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA.

S. W. Evans, being duly according to law, doth depose and say that he knows that the said Nelson F. Evans is in actual confinement in the Eastern Penitentiary, in the State of Pennsylvania, under an aggregate sentence of seven years' imprisonment imposed in December last by the Hon. William Butler, United States District Judge for the Eastern District of Pennsylvania, upon verdicts of guilty rendered against the said Nelson F. Evans upon bills of indictment charging him with a willful misapplication of the funds of the Spring Garden National Bank, of which he was a director.

Sworn to and subscribed before me, this day of , A. D. 1893.

October Term, 1893. Nos. 922, 923.

IN THE

Supreme Court of the United States.

NELSON F. EVANS, Plaintiff in Error,
vs.
THE UNITED STATES.
RECORD CASE *No. 15,299.*

NELSON F. EVANS, Plaintiff in Error,
vs.
THE UNITED STATES.
RECORD CASE *No. 15,300.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

J. LEVERING JONES,
HAMPTON L. CARSON,
RUFUS E. SHAPLEY,
Counsel for Plaintiff in Error.

Allen Lane & Scott, Prs., Phila.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1893. Nos. 922, 923.

Nelson F. Evans, Plaintiff in Error,

vs.

The United States.

RECORD CASE
No. 15,299.

Nelson F. Evans, Plaintiff in Error,

vs.

The United States.

RECORD CASE
No. 15,300.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

CASE NO. 15,299.
CASE NO. 15,300.

The facts in both cases are precisely similar. The distinction between them in number is purely arbitrary, and they were not separately treated in the court below.

The plaintiff in error was indicted upon the sixteenth day of May, 1892, as a director in the Spring Garden National Bank, for numerous acts alleged to be in violation of section 5209 of the Revised Statutes of the United States, which is as follows:—

"SECTION 5209. *Every president*, DIRECTOR, *cashier, teller, clerk, or agent of any association* WHO *embezzles, abstracts, or* WILLFULLY MISAPPLIES ANY OF THE MONEYS, FUNDS, OR CREDITS OF THE ASSOCIATION, *or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of the association* WITH INTENT, *in either case,* TO INJURE OR DEFRAUD THE ASSOCIATION, *or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such*

association, and EVERY PERSON *who* WITH LIKE INTENT AIDS OR ABETS ANY OFFICER, CLERK, OR AGENT *in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years, nor more than ten.*"

The bank had failed upon the 9th of May, 1891, and had then closed its doors, passing into the hands of a receiver. More than a year afterwards, Mr. Evans, who had been for many years a depositor, a stockholder, and director, but never an officer, was indicted in a manner which proved most oppressive.

The indictment, as originally found, contained four hundred and eighty-five counts, charging one hundred and sixty-five distinct offenses; or, viewing it as three volumes of indictments, the first contained one hundred and forty-six counts, the second one hundred and fifty-two counts, and the third one hundred and eighty-seven counts, overlapping each other in such a manner as to give the defendant but a confused notion of what was charged against him, obscuring, by the very multiplicity of counts, the real purpose of the prosecution, and overtaxing the mind of the defendant and his counsel.

A motion to quash the indictment on the ground that it was vexatious, oppressive, and unreasonable, was duly made and refused. A request for bills of particulars under the general counts was also refused. A suggestion was made to the United States District Attorney by the court, which was subsequently adopted, that he should select certain counts upon

which he could fairly press for a conviction, and abandon all the others. This was subsequently done, and in the case entitled as of May Sessions, No. 50 (Record case No. 15,299), as to all counts except 8, 9, 10, 14, 81, 82, 99, 102, 110, 111, 114, 117, 121, 124, 130, 131, 132, 135, 137, 140, 142, 143, 145, and 146, *a nolle prosequi* was entered. In No. 51 (Record case No. 15,300), a *nolle prosequi* was entered as to all counts except Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 87, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, 152.

Demurrers were filed to these counts, based on reasons which apply equally well to No. 81, of Record case 15,299, and to Nos. 21, 87, and 130 of Record case No. 15,300. The demurrers were overruled forthwith, and on the same day the defendant was then arraigned and pleaded "not guilty," and a jury was called. A trial was had resulting in conviction; a motion for a new trial was overruled; a motion was then made in arrest of judgment substantially upon the same grounds as had been urged in support of the demurrers prior to plea pleaded.

This motion was overruled and judgment was entered, the sentence in Record case No. 15,299 being imprisonment in the Eastern Penitentiary for the Commonwealth of Pennsylvania for the term of five years, and in Record case No. 15,300 the sen-

tence being like imprisonment for the term of two years at and from the expiration of the previous term.

Writs of error were then duly issued and the records brought to this tribunal for consideration.

The questions involved are those of the sufficiency in point of law of the various counts in the indictments upon which the defendant was sentenced. The manner in which they are raised is by motion in arrest of judgment, based upon grounds previously urged in support of demurrers.

ASSIGNMENT OF ERRORS IN RECORD CASE NO. 15,299.

It is submitted that the court below erred in the following respects :—

1. The learned court erred in overruling the demurrer to counts 8, 9, and 10; the ground of said demurrer being that said counts were defective in that there was no averment that the said defendant did not receive said notes as an agent for collection, or to secure their renewal, and subsequently failed to account for the same to the said Spring Garden National Bank either as to proceeds or renewals; and, further, because there was no averment that the bank did not, either at the time of surrender, or at any subsequent time, receive security, value, or renewal notes therefor, and, further, because there

was no averment that the bank has been in any manner a loser thereby.

2. Because the court erred in overruling the motion in arrest of judgment upon said counts numbers 8, 9, 10; said motion in arrest of judgment being urged upon the ground that there was no averment that the said defendant did not receive said notes as an agent for collection, or to secure their renewal, and subsequently failed to account for the same to the said Spring Garden National Bank either as to proceeds or renewals; and, further, because there was no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security, value, or renewal notes therefor; and, further, because there was no averment that the bank has been in any manner a loser thereby.

3. The court erred in overruling the demurrer to counts 10 and 14; the ground of said demurrer being that said counts were bad in that there was no averment that the president or cashier of the Spring Garden Bank, in discounting, as president or as cashier, the various notes therein described, acted in excess of their powers or outside of their regular duties; nor was there any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper; nor was there any averment that said discounts were pro-

cured by any fraudulent means, nor was there any averment that the said Nelson F. Evans was, at the time of said discounts, insolvent or knew himself to be so.

4. The court erred in refusing to arrest judgment upon counts Nos. 10 and 14; said motion in arrest of judgment being based upon the ground that said counts were bad in that there was no averment that the president or cashier of the Spring Garden National Bank, in discounting, as president or cashier, the various notes therein described, acted in excess of their powers or outside of their regular duties; nor was there any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper; nor was there any averment that the said discounts were procured by any fraudulent means; nor was there any averment that the said Nelson F. Evans was, at the time of said discounts, insolvent or knew himself to be so.

5. The court erred in overruling the demurrer filed to counts 82, 99, 102, 110, 111, 114, 117, 121, 124, 130, 131, 132, 134, 137, 140, 142, 143, 145, 146, said demurrer being based upon the ground that said counts were defective in that they contained no averment that the overdrafts complained of were not according to the usual and customary course of banking, or were contrary to the practice and contract between the said defendant and the Spring

Garden National Bank, or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

6. The court erred in refusing to arrest the judgment moved for upon counts 82, 99, 102, 110, 111, 114, 117, 121, 124, 130, 131, 132, 135, 137, 140, 142, 143, 145, and 146, said motion in arrest of judgment being based upon the ground that said counts were defective in that they contained no averment that the overdrafts complained of were not according to the usual and customary course of banking, or were contrary to the practice and contract between the said defendant and the Spring Garden National Bank, or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

7. The court erred in overruling the demurrer filed to counts Nos. 131, 132, and 146, said demurrer being based upon the ground that said counts were bad, because they contained no averment that the said orders or charges against the said Nelson F. Evans, which on their face, as displayed in said indictment, were drawn and signed by Francis W. Kennedy as president, were made with the knowledge or consent, or with the subsequent assent of the defendant, or that he had obtained, or did obtain, any moneys thereon.

8. The court erred in refusing to arrest the judgment moved for upon counts Nos. 131, 132, and 146, said motion in arrest of judgment being based upon the ground that said counts were bad in that they contained no averment that the said orders or charges against the said Nelson F. Evans, which on their face, as displayed in said indictment, were drawn and signed by Francis W. Kennedy as president, were made with the knowledge or consent, or with the subsequent assent, of the defendant, or that he had obtained, or did obtain, any moneys thereon.

ASSIGNMENT OF ERRORS IN RECORD CASE NO. 15,300.

1. The court erred in overruling the demurrer filed to the first count in said indictment, said demurrer being based upon the ground that it contained simply an averment of a willful misapplication of the moneys, funds, and credits of the Spring Garden National Bank by the defendant as director, with the intent to defraud the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

2. The court erred in refusing to arrest the judgment upon the first count, the motion in arrest of judgment being based upon the ground that said count was defective, in that it contained simply an

averment of a willful misapplication of the moneys, funds, and credits of the Spring Garden National Bank by the defendant as a director, with the intent to defraud the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made, and showing that they were unlawful.

3. The court erred in overruling the demurrer filed to the second count in said indictment, said demurrer being based upon the ground that said count simply charged a conspiracy, and failed to set forth by sufficient and necessary descriptive averments either that the object of the conspiracy was a crime against the United States, there being no specification of the means of said alleged misapplication, and, further, because there was no averment that the means resorted to in pursuance of said alleged conspiracy were a crime against the United States, nor was there any specification or description of the means themselves.

4. The court erred in refusing to arrest judgment upon the second count in said indictment, the motion in arrest of judgment being based upon the ground that said count contained simply an averment of conspiracy, and failed to set forth by sufficient and necessary descriptive averments either that the object of the conspiracy was a crime

against the United States, there being no specification of the means of said alleged misapplication, and, further, because there was no averment that the means resorted to in pursuance of said alleged conspiracy were a crime against the United States, nor was there any specification or description of the means themselves.

5. The court erred in overruling the demurrer filed to the third count of said indictment, said demurrer being based upon the ground that said count charged the defendant with aiding and abetting the president of the Spring Garden National Bank to misapply the funds, credits, and moneys of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made and showing that they were unlawful.

6. The court erred in refusing to arrest the judgment upon the third count of said indictment, the motion in arrest of judgment being based upon the ground that said count was defective, in that it charged the defendant with aiding and abetting the president of the Spring Garden National Bank to misapply the funds, credits, and moneys of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misappli-

cation was made, and showing that they were unlawful.

7. The court erred in overruling the demurrer filed to the fourth count of said indictment, said demurrer being based upon the ground that said count was defective in that it charged the defendant with aiding and abetting the cashier of the Spring Garden National Bank to misapply the funds, moneys, and credits of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made, and showing that they were unlawful.

8. The court erred in refusing to arrest the judgment upon the fourth count in said indictment, the motion in arrest of judgment being based upon the ground that said count was defective in that it charged the defendant with aiding and abetting the cashier of the Spring Garden National Bank to misapply the funds, moneys, and credits of the association, without averring how the application was made, and that it was an unlawful one, and without specifying the means whereby said alleged misapplication was made, and showing that they were unlawful.

9. The court erred in overruling the demurrer filed to the fifth, tenth, and eleventh counts in said

indictment, said demurrer being based upon the ground that there was no averment in said counts that the check given by the defendant upon the Keystone National Bank, dated March 17th, 1891, for $15,333.35, to the order of the Spring Garden National Bank, was presented by the latter to the former for payment, and that payment thereof was refused, and that the bank thereby became a loser.

10. The court erred in refusing to arrest the judgment moved for upon counts five, ten, and eleven, said motion in arrest of judgment being based on the ground that the said counts were bad in that they contained no averment that the check given by the defendant upon the Keystone National Bank, dated March 17th, 1891, for $15,333.35, to the order of the Spring Garden National Bank, was presented by the latter to the former for payment, and that payment thereof was refused, and that the bank thereby became a loser.

11. The court erred in overruling the demurrer filed to the sixth, seventh, eighth, ninth, twelfth, and thirteenth counts in said indictment, said demurrer being based upon the ground that said counts contained no averment that the said checks therein described were not paid, or that the respective indorsements thereon that they were paid through the Clearing House were false, or that the said indorsements were made, or permitted to be made,

by the defendant with the knowledge of their falsity, and with the intent to defraud the bank, and that the Spring Garden Bank was damaged by the transaction.

12. The court erred in refusing to arrest the judgment moved for upon counts 6, 7, 8, 9, 12, and 13, said motion in arrest of judgment being based upon the ground that said counts were defective in that they contained no averment that the said checks therein described were not paid, or that the respective indorsements thereon that they were paid through the Clearing House were false, or that the said indorsements were made or permitted to be made by the defendant with the knowledge of their falsity, and with the intent to defraud the bank, and that the Spring Garden Bank was damaged by the transaction.

13. The court erred in overruling the demurrer filed to counts 16 and 20, said demurrer being based upon the ground that said counts were bad in that they contained no averment that the president or cashier of the Spring Garden National Bank in discounting, as president or as cashier, the various notes therein described, acted in excess of their powers or outside of their regular duties, nor did they contain any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper, nor did they contain

any averment that said discounts were procured by any fraudulent means, nor did they contain any averment that the said defendant was, at the time of the said discounts, insolvent, or knew himself to be so.

14. The court erred in declining to arrest the judgment moved for upon counts 16 and 20, said motion in arrest of judgment being based upon the ground that said counts were defective in that they contained no averment that the president or cashier of the Spring Garden National Bank in discounting, as president or as cashier, the various notes therein described, acted in excess of their powers or outside of their regular duties, nor did they contain any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper, nor did they contain any averment that said discounts were procured by any fraudulent means, nor did they contain any averment that the said defendant was, at the time of the said discounts, insolvent, or knew himself to be so.

15. The court erred in overruling the demurrer filed to counts 14, 15, and 16, said demurrer being based upon the ground that said counts were defective in that they contained no averment that the said defendant did not receive said notes as agent for collection, or to secure their renewal, and subsequently failed to account for the same to the said

Spring Garden National Bank either as to the proceeds or renewals, and, further, because they contained no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security, value, or renewal notes therefor, and further because they contained no averment that the bank had been in any manner a loser thereby.

16. The court erred in refusing to arrest the judgment upon counts 14, 15, and 16, said motion in arrest of judgment being based upon the ground that said counts were defective in that they contained no averment that the said defendant did not receive said notes as agent for collection, or to secure their renewal, and subsequently failed to account for the same to the said Spring Garden National Bank either as to the proceeds or renewals, and further because they contained no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security, value, or renewal notes therefor, and further because they contained no averment that the bank had been in any manner a loser thereby.

17. The court erred in overruling the demurrer filed to counts 22, 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, and 152, said demurrer being based on the ground that said counts were defective in that they contained no averment that the overdrafts complained

of were not according to the usual and customary course of banking, or contrary to the practice or contract between the said defendant and the Spring Garden National Bank, or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

18. The court erred in refusing to arrest the judgment moved for upon counts 22, 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, and 152, said motion in arrest of judgment being based upon the ground that said counts were defective in that they contained no averment that the overdrafts complained of were not according to the usual and customary course of banking, or contrary to the practice or contract between the said defendant and the Spring Garden National Bank, or that they were not loans, and that interest was not charged thereon, and that they have not since been paid, and that the bank is a loser thereby.

19. The court erred in overruling the demurrer filed to counts Nos. 70, 71, 86, 137, 138, and 152, said demurrer being based upon the ground that said counts were bad because they contained no averment that the said orders or charges against the said Nelson F. Evans which, on their face, as displayed in said counts, were drawn and signed by

Francis W. Kennedy as president, were made with the knowledge or consent, or with the subsequent assent, of the defendant, or that he had obtained, or did obtain, any moneys thereon.

20. The court erred in refusing to arrest the judgment moved for upon counts Nos. 70, 71, 86, 137, 138, and 152, said motion in arrest of judgment being based upon the ground that said counts were defective in that they contained no averment that the said orders or charges against the said Nelson F. Evans, which, on their face, as displayed in said counts, were drawn and signed by Francis W. Kennedy as president, were made with the knowledge or consent, or with the subsequent assent, of the defendant, or that he had obtained, or did obtain, any moneys thereon.

BRIEF OF ARGUMENT.

The contents and substance of these various counts in the indictments may be summarized as follows:—

Record case No. 15,300, Count 1 (printed record, page 9), a general count charging willful misapplication of the funds of a national banking association by a director thereof.

Count 2 (printed record, page 10), a general count charging conspiracy between officers of a banking association to willfully misapply the moneys, funds, and credits thereof.

Count 3 (printed record, page 10), a general count charging the defendant with aiding and abetting the president of a national banking association in misapplying the moneys, funds, and credits thereof.

Count 4 (printed record, page 11), a general count charging the defendant with aiding and abetting the cashier of a national banking association in misapplying the moneys, funds, and credits thereof.

The remaining counts are not general, but specific, and from 5 to 7, inclusive (printed record, pages 11–14), charge the defendant as a director with misapplying moneys, funds, and credits by the deposit of checks and the obtaining of fictitious credits; counts 8 to 10 (printed record, pages 14–17) with aiding and abetting the president in misapplying the funds in the same manner; counts 12 to 13 (record, pages 19, 20), aiding and abetting the cashier in misapplying the funds in the same manner; counts 14 to 16 (record, pages 21–24), aiding and abetting the president in misapplying the funds by surrendering notes; 20 and 21 (record, pages 24–26), aiding and abetting the president in misapplying the funds by discounting unsecured notes; 21 (record, pages 26, 27), by misapplying moneys through overdrafts; 87 (record, page 46), aiding and abetting the president to misapply the funds through overdrafts; and counts 88 to 152 (record, pages 47–72), abetting the president to misapply the funds thereof through overdrafts.

Record case 15,299, summarized as to the counts

pressed at the trial, 8, 9, 10 (printed record, pages 7-9), charged the defendant with aiding and abetting the cashier in misapplying funds by surrendering notes; count 14 (record, page 10), in aiding and abetting the cashier to misapply funds by discounting an unsecured note; counts 81 to 146, inclusive (printed record, 11-37), with aiding and abetting the cashier in misapplying funds through overdrafts.

The reasons filed in support of the various demurrers, as well as those filed in support of the motion in arrest of judgment, embody substantially the grounds which we now propose to press in argument upon this writ of error.

The first four counts in Record case 15,300 may be treated together.

Count 1 (printed record, page 9), charges Nelson F. Evans, being a director of a national bank, duly incorporated as such, with knowingly, unlawfully, fraudulently, and willfully, and with intent to injure and defraud the bank, misapplying certain of the moneys, funds and credits of the bank for his own use, benefit, and advantage, to wit, the sum of $100,000, contrary, &c.

Count 2 (printed record, page 10), charges that the said Nelson F. Evans knowingly, willfully, unlawfully, and fraudulently conspired with Francis W. Kennedy and H. H. Kennedy, being president and cashier respectively of a national bank, in committing an offense against the United States, to wit,

willfully misapplying a large amount of money, funds, and credits of the said bank, to wit, the sum of $100,000, with intent to injure and defraud the bank for their own use and advantage, and that afterwards they did knowingly, willfully, unlawfully, and fraudulently misapply a large amount of the moneys of the bank, to wit, the sum of $100,000, with intent to injure and defraud the bank for the use, benefit, and advantage of those so conspiring.

Count 3 (printed record, page 10) charges that the defendant did knowingly, willfully, unlawfully, and fraudulently aid and abet Francis W. Kennedy, the president, to misapply a certain amount of money of the bank, to wit, the sum $100,000, for the use, benefit, and advantage of the said Nelson F. Evans, with intent to injure and defraud the bank, and

Count 4 (printed record, page 11) makes the same charge against the defendant, only substituting the name of H. H. Kennedy for that of Francis W. Kennedy, as cashier.

IT IS CONTENDED THAT ALL OF THESE COUNTS ARE BAD, BECAUSE, WHILE AVERRING A WILLFUL MISAPPLICATION WITH INTENT TO DEFRAUD, THEY WHOLLY FAIL TO AVER THAT THE APPLICATION WAS AN UNLAWFUL ONE, AND BECAUSE THEY FAIL TO SHOW THAT THE MEANS WHEREBY SAID ALLEGED MISAPPLICATION WAS MADE WERE UNLAWFUL. BESIDES, THERE IS NO AVERMENT OF LOSS OR DAMAGE TO THE BANK.

It may be conceded that the language of these counts follows very closely the language of section 5209 of the Revised Statutes of the Acts of Congress, in defining the offense. It may be conceded, also, that as a general rule, when an offense is purely statutory, it is sufficient, in an indictment for a misdemeanor, to charge the defendant in the words of the statute. But this rule has its limitations; as was said by Mr. Justice Gray, in the case of the United States *vs.* Carll (105 U. S. Rep., 611): "*In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.*" The authorities quoted by the learned Justice in support of this doctrine are: United States *vs.* Cruikshank, 92 U. S., 542; United States *vs.* Simmons, 96 *Id.*, 360; Commonwealth *vs.* Clifford, 8 Cush. (Mass.), 215; Commonwealth *vs.* Bean, 11 *Id.*, 414; Commonwealth *vs.* Bean, 14 Gray (Mass.), 52; Commonwealth *vs.* Filburn, 119 Mass., 297.

A. It is clear that as to the offense sought to be charged in the indictment in question, no light can be drawn from the common law, as the offense was entirely unknown to it. The words of the statute "*willfully misapply*" do not of themselves fully set forth the offense. We must bear in mind the language of Mr. Justice Woods, in speaking judicially of the very section of the Revised Statutes (5209) under which this indictment has been sought to be framed. In the case of the United States *vs.* Britton, 107 U. S. Rep., 655, he says: "*The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle,' as used in the statutes, or the words 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves, fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant willfully 'misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one.*"

Let us apply to the language of the indictments now under consideration the test thus established.

There are no averments in any one of these four general counts which show how the application was made, and hence it cannot be adjudged on the face of the indictment that it was a misapplication

of the funds of the bank, or that the application was an unlawful one. There is no specification of the means whereby said alleged misapplication was made, nor is there any showing that the means resorted to were unlawful. *There is no allegation* that the defendant *abstracted* or *embezzled* the funds of the bank, or that he obtained possession of the moneys of the bank by trick, artifice, or fraud. The words "willfully misapplied" stand entirely unsupported by any averments as to how the application or misapplication was made.

B. The simple averment that the application was "to his own use" is not sufficient, and does not, we submit, supply any essential ingredient to the words "willful misapplication." The use of the funds of the bank by a bank director is not, and cannot be of itself, unlawful. In most cases it is legitimate, natural, and proper, and in the direct line of business. Bank directors can, in a legal, moral, and business sense, be borrowers from the bank with perfect propriety. They are not forbidden by law to be borrowers, and it is well known by all conversant with banking organizations that they are frequently chosen directors of a financial institution because of the fact that their large business operations require the use of large sums, thus insuring the use of the funds of the bank in a profitable connection. Banks are not simply places of deposit. They are institutions established to furnish currency through notes and the discount of notes. They are

intended to furnish funds to the channels of trade, to supply life-blood to the business world through a circulating medium, and depositors who place their funds there well know that the moneys are not to be hoarded, but are to be loaned out again in the due course of business. That bank directors may very properly be borrowers from their own banks is illustrated by a recent bill favorably reported by the House Committee on Banking and Currency. The bill is intended to promote the safety of funds and deposits in national banks. In terms it prohibits the officers and other employés of banks, *except directors*, who are not otherwise officers or employés, to become borrowers or to become liable to the bank by reason of overdrawn accounts, or as an indorser, guarantor, surety, or otherwise, except upon a written application, approved by a majority of the directors or executive committee. There must be some resulting advantage to a bank director in return for the risks and responsibilities he assumes. That directors should serve without compensation, at enormous inconvenience and personal and legal risk to themselves, without the right to obtain loans or business accommodation at their own banks, is too preposterous an expectation for business men to entertain. It may be that a bank director may take advantage of his position and do the bank an injury; but a bank director in debt to his bank ought not to be viewed as a spotted man. He may be a criminal, but it should not be assumed that he is such, and the proof

that he is such must be clear and positive. The mere fact of his indebtedness to the institution is nothing unlawful, and suspicion should not attach to it *per se*. The allegation, therefore, that the funds were obtained for his own use, standing alone should not be considered sufficient, when added to the mere allegation of willful misapplication, to constitute a complete and well rounded charge of crime under section 5209, as interpreted by Mr. Justice Woods in U. S. *vs.* Britton.

To hold that a bank director cannot obtain for his own use the funds of the bank without a presumption of crime, would be to apply such a harsh rule that, in the words of Judge Sharswood in Spring's Appeal, 71 Penna. St., 11–20, "No gentlemen of character and responsibility would be found willing to accept such places."

The reports of the Comptroller of the Currency have repeatedly expressed a caution against legislation increasing the restrictions and responsibilities of directors, as tending to deprive banks of the services of prominent business men. On page 41 of his report for 1892, Comptroller Hepburn used this language: "In our large cities it is very difficult to get the most desirable men to act as directors. Those most actively engaged in business are the best judges of credit, can least afford to give attention to the duties of the office, and would most readily decline to serve. Legislation increasing the financial responsibility of directors for losses to cred-

itors would depreciate the character of boards of direction and render the task of getting good responsible men more difficult."

If this judgment of Comptroller Hepburn is good concerning a director's financial responsibility, still greater caution should be exercised in increasing the danger of his being charged with criminal liability in times of misfortune.

It will surely imperil the national banking system, with its matchless record of safety and convenience, if, to become a director, easily involves the loss of reputation, fortune, and liberty when his bank may fail in a panic or through the mismanagement of officers to whom he has reasonably given his full confidence.

This statute (5209) cannot intend such results and must not have such construction forced upon it by local popular clamor for victims in times of excitement over financial disasters.

The duties, liabilities, and responsibilities of directors of national banks have been so recently considered by this tribunal, in the case of Briggs *vs.* Spaulding, 141 U. S., 132, that no further citation is needed. In that case Chief Justice Fuller used the following language in speaking of bank directors :—

" *They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation, and they cannot be held responsible for the losses resulting from the*

wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or neglect to use proper care in the appointment of agents." And again he says: "*Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agency in business transactions, and that the degree of watchfulness must be proportioned to that presumption.*" And again: "*Nor is knowledge of what the books and papers would have shown to be imputed.*"

C. As to the only remaining averment, that the application of the bank's funds was made to the use of the defendant "with intent to defraud," these words are but an extension of the meaning of the word "willful." They do not indicate how the application was made, but constitute an attempt on the part of the pleader to guess at the operations of the mind and to supply an absence of substantial averments of overt acts, from which alone the intention can be inferred, by bold but unsupported assertions of the existence of a mental condition.

Clearly this is insufficient. It is not enough to aver a fraudulent intent; *there must be some specification of the means* by which the fraud was accomplished. Upon this point we quote extensively from a celebrated case, most ably argued by distinguished criminal pleaders, and most thoroughly considered by an able judge.

In the case of the United States *vs.* Watkins, 3 Cranch's Circuit Court Reports, 441, the requisites of an indictment charging fraud were most exhaustively considered, and certain principles there established which rest upon the clearest authorities, quoted in the opinion of Chief Justice Cranch. The case was argued several times, and the conclusions of the court were subjected to severe criticism and review, but repeated arguments only served to strengthen the positions originally taken. It was held that an indictment charging fraud ought to aver the means by which the fraud was effected. The exact language of the opinion is as follows :—

"*The next question is whether the fraud be sufficiently set forth in the indictment. The indictment must be at least as certain and precise as a special verdict, in which no material fact can be inferred. This indictment is undoubtedly intended to be for a fraud, and ought to aver the means by which the fraud was effected.* * * * *The offense, therefore, which the accused is called upon to answer is a fraud upon the United States, perpetrated by means of the false pretenses previously set forth in the indictment; yet there is nothing in the previous part of the indictment in direct averment of any pretense, either true or false.* * * * *But it does not state what the pretense was. It does not state that the accused pretended or affirmed anything to anybody. If there was no pretense there was no false pretense. Let us analyze this averment, and apply, as was no doubt intended,* singula singulis.

* * * *It is averred that the letters were written and sent, drafts were drawn and sold and the requisition was obtained 'as false pretense.' The word 'as' means 'like'—not the thing itself, but something like it, but if it was to be construed as an averment that the letters, drafts, and requisitions were false pretenses, and by means of such false pretenses the accused defrauded the United States, such an averment in an indictment is not sufficiently certain. The averment must state what was pretended; and that what was pretended was false, and wherein and in what particular it was false. The gist of the crime is the falsehood of the pretense, and it is therefore necessary that it should be made apparent upon the face of the indictment by positive and precise averments.*"

After a most learned examination of the authorities, and a reargument, Chief Justice Cranch delivered a second opinion, in which he used this language:—

"*Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is, therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done*

fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. Starkie, in his late treatise on Criminal Pleading, says: "Whether particular circumstances constitute an indictable fraud is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out in order to show that the facts amount to an indictable offense."

And again he quotes Archbold, as follows:—

"An indictment for an offense against the statute must with certainty and precision charge the defendant to have committed acts, under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in the offense be omitted the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict, nor will the conclusion, contra formam statuti, *cure it."*

He then goes on to say:—

"One of the necessary and essential ingredients of fraud is deceit. Without deceit there can be no fraud in the legal sense of the word. No fraud can be committed but by deceitful practices, practices calculated to deceive. There may be injuries to the public without deceit, and they may be indictable at common law, but they cannot be frauds. The particular deceitful practices by means of which the fraud is alleged to have been committed must be specially set forth;

so that the deceit may appear upon the face of the indictment, in order that the court may judge whether the fraud which constitutes the crime can be inferred from the facts stated in the indictment. Whether the deceitful practices consist of false tokens, of fabricated letters or forged notes, or false pretenses, expressed either by words or signs or acts, they must be set forth with proper averments, showing and falsifying the pretended facts which were the means of the deceit.

"*If, then, the law is as we have stated it to be, that fraud is an inference of law from certain facts; that every indictment for fraud is bad which does not positively aver all the facts necessary to raise that inference of law; that the expressions 'fraudulently and with intent to defraud the United States,' and 'that the United States were defrauded' are not averments of matters of fact, but of inference of law; there will be nothing left, according to the idea of the counsel of the United States, as to what is necessary in an indictment of fraud upon the United States but the averment that certain apparently innocent acts were done by the defendant.*"

And again he says:—

"*We look in vain among these facts for such as show that deceit, which is an essential ingredient in fraud.*

"*There is no fact averred in relation to the letter, or the draft, or the requisition which shows any deceitful practice, any attempt to deceive anybody, or to impose upon any agent of the Government. Upon*

that most essential point the facts give us no information. Fraud, even in civil cases, is never to be presumed; and in criminal cases the accused is always presumed to be innocent until the contrary appears."

And again :—

"*But it is said that the actual perpetration of the fraud is plainly averred. The simple averment of fraud, or that the United States were defrauded, is only the averment of a matter of law—a legal inference from facts; but facts must themselves appear to justify it. The acts by which the fraud was committed, it is said, are also set forth, namely, the letter, the draft, and the requisition. These may be among the acts by which the injury was done to the United States, but they are not such acts as show the deceitful practices by which the fraud was effected. The only facts averred respecting those papers are that the letter was written and sent, the draft was drawn and sold and paid, and the requisition was procured. These facts alone do not show the fraud.*"

This language and this ruling was applied to an indictment which charged specifically Tobias Watkins, an officer of the Treasury of the United States, and an evil disposed person, with devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use, divers sums of money of the United States, and with falsely and fraudulently writing and addressing, and causing to be sent to a certain J. K. Paulding, then the

navy agent of the United States at the city of New York, a letter in the words and figures following. (The letter was here set forth, and the various successive steps were also set forth up to the actual drawing of a requisition.) The indictment then charged that the letters and drafts so as aforesaid written and drawn and sold as aforesaid, and the requisition caused and procured to be issued as aforesaid, were, and each of them was, so written, drawn and sold, and caused and procured to be issued without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Watkins, and with intent to defraud the said United States, and as false pretenses to enable him to obtain and keep to his own use and benefit the said sums of money, and that by means of the said several pretenses, the said Watkins did at the time and times aforesaid defraud the United States of the said sums of money, and dispose of the same to his own use and benefit to the great damage of the United States and against the principles and government thereof.

It will be observed that this attempt to charge a crime in language which was considered by Chief Justice Cranch as objectionable, because falling far short of the legal requirements as to certainty in an indictment charging crime, far exceeds in its particularity the forms in the various counts of the indictments under consideration in the present case, and hence the reasoning applies with redoubled force.

We submit that, tested by the rules established by the foregoing authorities, these four counts fail because they do not contain any averments showing how the application of the funds of the bank was made, or that such application was an unlawful one.

Besides, there is no averment whatever that the bank was a loser or has been damaged. The features which have been especially dwelt upon as lacking in the cases cited, are lacking from all these four general counts, but the remaining counts, Nos. 2, 3, and 4, need a little further specific consideration.

Count 2 (printed record, page 10), charging a conspiracy, comes next in order.

If what has been already urged is sufficient to show that the main offense against the United States, as defined by section 5209, as charged in the present indictment, is insufficiently set forth, then it follows that the conspiracy itself is insufficiently set forth. Conspiracy, as defined by all the authorities, consists, either of an agreement or combination of two or more persons, by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. Commonwealth *vs.* Hunt, 4 Metcalf (Mass), 111 (A. D. 1842, per Ch. J. Shaw). In other words, either the end or the means must be unlawful. If the end be not unlawful, or if the object sought to be accomplished by the conspiracy be not of itself a crime, or be insufficiently set forth in the indict-

ment as a crime, then it is quite clear that the indictment discloses no sufficient charge of crime, unless there be also displayed the means resorted to in pursuance of the conspiracy, and these means must themselves be unlawful or criminal. If the end be criminal—such as to commit an indictable offense—then the indictment need not set forth the means, as the criminality of the act is sufficiently apparent; but if it be an agreement to commit an act not in itself necessarily indictable, then illegal means must be displayed in order to show the criminality of the conspiracy.

It is quite evident that where the *end* is unlawful it cannot be necessary to set forth the means. The reason is that a mere agreement, even if unexecuted, to commit a crime *malum in se* or *malum prohibitum*, constitutes of itself the crime of conspiracy. If unexecuted the means cannot be stated; if executed the means employed are but evidence of the offense or an aggravation of it. But if the end be lawful, or if the end be not shown by the language stated in the indictment to be unlawful—that is, an indictable offense—but the crime consists simply in the means employed, then it is plain that the means must be set forth in order to disclose the criminality of the act charged.

These are the general and well-established rules governing the framing of indictments in cases of conspiracy, drawn from a review of the various decisions upon the subject. They are brought together

and reviewed in the chapter entitled "Requisites of Indictments," in Carson on the American cases relating to Conspiracy, published with the excellent English treatise of Mr. Wright on the law of Criminal Conspiracies, page 186 to 211 inclusive. They are sustained by the decisions of the courts of the United States, as reported in the various volumes of the Federal Reporter quoted in that chapter.

In the case of the United States *vs.* Martin, 4 Clifford, 156, which was that of a conspiracy to defraud a national bank, it was held that it must appear upon the face of the indictment: First, that the persons named conspired together and entered into an unlawful agreement or combination; second, that they conspired to commit an offense against the laws of the United States; third, that one or more parties did some act to effect the object of said unlawful combination or agreement.

Applying these tests to count No. 2, it appears that the count is defective, because of an insufficient description of the offense sought to be charged as an end. Failing in this, it utterly lacks any specification of the means resorted to in pursuance of the alleged conspiracy, and therefore contains no sufficient averment of crime.

Counts Nos. 3 and 4 (printed record, pages 10, 11) are general in their nature, and allege that the defendant as a director did "aid and abet." This is equally insufficient as an averment of crime, unless

it be charged that there was full knowledge on the part of the defendant of the original plans and designs of the president and cashier. The president and cashier are the officers naturally, properly, and unavoidably intrusted by the directors with the management of the affairs of the bank and the administration of its concerns. A full knowledge of the affairs of the bank, of what the officers are doing, of what their plans or purposes are, cannot be imputed, as a matter of legal presumption, to a bank director so as to sustain against him a charge of crime. In this connection we again quote the language of Chief Justice Fuller in the case of Briggs *vs.* Spalding, "*Nor is knowledge of what the books and papers would have shown to be imputed.*" And the Chief Justice quoted with approval the language of Judge Earl in the case of Wakeman *vs.* Dalley, 51 N. Y., 27, in which he said, in speaking of Dalley, "*As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this then the position of a director in any large corporation like a railroad or banking or insurance company is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely*

trust to them. They publish their statements and reports, relying upon figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatements in such reports and statements, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should."

Knowledge, therefore, of the plot hatched by the president and the cashier is necessary to constitute the defendant an aider or abettor, and it should have been charged distinctly that he had such knowledge, and acted upon it as a principal, vigilant, well informed, and not as a mere dupe, ignorant and imposed upon. The insufficiency of the averment in the indictment is not to be helped by any legal presumption which results in imputing to a man crime or knowledge of a crime, without requiring the pleader to define his charge, and to substantially support it by the proper allegations.

We submit that all of these general counts are bad, and that either the demurrer to the indictment or the motion in arrest of judgment should have been sustained.

Having displayed by the foregoing analysis the entire insufficiency of the four General Counts under the decisions, let us now consider the question how far they are aided by the Special Counts, treating these Special Counts as efforts to display the means by which an alleged misapplication of the funds of the bank was attempted to be made.

The Counts will be classified according to their subject-matter. It will be observed, that they fall into groups of three: The first of the trio charging an act by the defendant himself, the second charging that he aided and abetted the president of the bank in the same act, the third that he aided and abetted the cashier.

IT IS CONTENDED AS TO ALL OF THE SPECIAL COUNTS THAT THEY ARE RADICALLY DEFECTIVE, BECAUSE WHILE ATTEMPTING TO DISPLAY THE MEANS OF THE ALLEGED MISAPPLICATION, THEY DO NOT SHOW THOSE MEANS TO BE UNLAWFUL. IN SHORT, THESE COUNTS, AS DRAWN, DO NOT EXCLUDE THE ASSUMPTION THAT THE INDICTMENT MIGHT BE PROVED AS LAID, AND THE DEFENDANT STILL BE INNOCENT. THIS IS A FATAL DEFECT. THE CHARGE AS LAID, OUGHT, IF PROVED, TO EXCLUDE THE HYPOTHESIS OF INNOCENCE.

DEPOSIT OF CHECKS, OVERDRAFTS.—Dealing first in order with *Counts 5, 10, and 11* of case No. 15,300 (printed record, pages 11, 17, 18). These Counts in substance, are as follows: that the defendant,

being a director of a national bank, obtained a false credit with his bank, against which he drew, by depositing a check drawn by him on another bank in excess of what he knew to be his balance there, and which check was not paid.

Upon this it is to be observed that all this might be true, and yet the defendant be wholly innocent.

(*a.*) *To overdraw one's bank account is nowhere defined by Act of Congress to be a crime.* It is so far a customary matter that in the official reports of the Comptroller of the Currency for years past, national banks in all parts of the country—especially in the west, southwest, and south, state officially the second item of their resources as consisting of "overdrafts." These aggregate throughout the country a sum in excess of sixteen millions of dollars. This is dwelt upon more in detail on page , of this brief.

(*b.*) *It is not stated in the indictment that the sum for which the check was drawn was in excess of the credit of the defendant with the Keystone Bank.* It is stated simply to be "in excess of all the sums and amounts which he was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the Keystone Bank." *Non constat* that the overdraft might not have been allowed by the Keystone Bank. *Non constat* that the credit of the defendant with the Keystone Bank was not such that the credit would have been extended; whether secured or unsecured is unimportant, for extensions

of credit upon personal and business reputation are common, aside from the matter of collateral security.

(*c.*) *It is not stated that the Keystone Bank refused to make payment of the check or declined to extend the credit to the defendant. Non constat* that the overdraft was not in accordance with contract or custom between the parties. The allegation that the check was not paid by the Keystone is not sufficient, for there is no averment that it was ever presented for payment and payment refused. *Non constat* that the money was not lost through a neglect to present the check in time. It is notorious that several national banks failed during those early months of 1891. In other words there is no averment in the indictment to exclude the idea of possible negligence on the part of the payee of the check, through failing to present it in time, or that the money might have been lost through the failure of the bank on which the check was drawn.

(*d.*) *There is no averment that it was intended that the check should not be presented, or that it was a mere device to obtain a false credit, and that it was not done in the regular course of business.*

(*e.*) *There is no averment that the defendant had no balance standing to his credit on the books of the Spring Garden Bank sufficient to cover the amount of the check.* Therefore *non constat* that the check as drawn was not charged back to the defendant's account on the books of the Spring Garden Bank. This would be the regular course. If for any rea-

son a check, deposited in the ordinary course of business and credited to a bank depositor's account, proves uncollectible, it is charged back to his account and the credit thus obliterated; or else he is notified of the fact and asked to reimburse his bank by drawing a check in its favor against his account as a depositor in that bank. *Non constat* that all this was not done in this case. *Non constat* that the defendant did not repay to the Spring Garden Bank the amount of this check. Suppose he had $30,000 to his credit at that time, can it be pretended that the funds of the bank were misapplied?

(*f.*) *There is no averment that the Spring Garden Bank has lost a dollar by the transaction or been damaged in the slightest degree.* There is no averment that the defendant is in debt to the Spring Garden Bank on this account: or that he is insolvent or that the money cannot be collected. There is nothing to show that the alleged misapplication was carried out, or caused loss to the bank.

Upon these grounds it is insisted most strenuously that all that is charged as done by the defendant consists of ordinary business acts—not in themselves criminal or even importing criminality. Grant them all to be true, and yet the guilt of the defendant does not appear. Surely, if on a trial of a charge of crime, the burden is on the prosecution to present such proof as to negative every hypothesis of innocence, the rule must be equally clear that in

framing an indictment it is incumbent on the prosecutor to state expressly all material facts which are necessary to constitute the crime charged.

It is a criterion of the sufficiency of an indictment for a statutory offense that the averments should make it certain that the act charged is the act forbidden by the statute and also "exclude any assumption that the indictment may have been proved and the defendant still be innocent."

Such is the language of C. J. Durfee in State *vs.* Melville, 11 R. I., 417. Or, to put it in another way, if the allegation is as consistent with innocence as with guilt, then it is clear that it is insufficient.

State *vs.* Plastridge, 6 R. I., 83;
American and Eng. Encyclopedia of Law, Vol. 10, Tit. Indictment, page 575.

We insist that as to these counts the test established in United States *vs.* Britton—"there must be averments to show how the application was made and that it was an unlawful one"—has not been complied with. The entire absence of an averment of loss to the bank excludes the idea of a misapplication of its moneys, funds, or credits. No institution can be defrauded if it has sustained no loss. No crime can have been committed unless some right has been disregarded. There must be damage or loss proved. And if necessary to make proof of loss, it must be equally necessary to aver it. If a man is charged with taking something, there must be proof

that something was taken. If it be not averred that something was taken, then it is clear that the evidence on trial could not be extended beyond the scope of the indictment—*the allegata and probata* must agree.

Again, one object of the rule as to certainty in an indictment is to enable one charged a second time with an offense to plead a former acquittal. Where the description of the offense is so vague as to render it uncertain what act is meant, it is clear that the defendant might be acquitted under the first indictment, and if re-indicted in a more specific and exact manner, would be wholly unable to satisfy a jury that he had been previously tried and acquitted upon the same charge. Tried by this test the indictment in this case must fail. If the defendant in this case were arraigned upon a new indictment, so framed as to escape the criticisms aimed at the present one, it would be impossible for him to satisfy a jury or a court that the matter had been already passed on and disposed of. His constitutional rights would be in jeopardy.

The objections which have been urged to Count 5 (printed record, page 11), can be urged with equal force against Counts 10 and 11 (printed record, pages 17, 18), which are simply charges of aiding and abetting the president and cashier respectively in doing that which is complained of as an original offense on the part of the defendant.

As to Counts Nos. 6, 7, 8, and 9 (printed record,

pages 12–16), 12 and 13 (printed record, pages 19, 20), it is urged that in addition to all that has been previously argued as to the preceding counts, there is a palpable repugnancy in averment. In one place it is averred that the check therein described was not paid. Yet in fact, as displayed upon the face of the indictment, the check distinctly shows by indorsement that it was paid. There is no allegation that the indorsement thereon, "Received Payment through the Clearing House," was false, nor that the indorsement, as made, was permitted to be made by the defendant with knowledge of its falsity, and with the intent to defraud the bank. The very face of the indictment negatives the charge of crime, and contradicts the idea of loss to the bank. If the contrary theory be pressed, that the check was not paid, then it must be observed there are no averments as to presentation of the check, or anything to exclude the idea of negligence on the part of the bank, or that the money was not lost through the failure of the Keystone Bank, upon which they were drawn. Nor is there any averment that the bank was damaged, or that the money has never since been repaid, that it was not charged back to Mr. Evans' account, or that Mr. Evans is in debt to the bank, or that he is insolvent and that the money cannot be collected, and hence that the Spring Garden Bank has sufferred loss. Whichever theory of construction be adopted, the result is contradictory, repugnant, and

uncertain. Need more be said in condemnation of these counts?

DISCOUNTING NOTES.—As to Counts 20 (printed record, case 15,300, page 23), 14 (printed record, case 12,999, pages 10, 11), it is urged that they were bad in that there is no averment that the president or cashier of the Spring Garden National Bank, in discounting, as president or cashier, the various notes therein described, acted in excess of their powers, or outside of their regular duties; nor is there any averment that the president or the cashier was not the duly authorized officer of the said bank to discount paper; nor is there any averment that said discounts were procured by any fraudulent means; nor is there any averment that the said Nelson F. Evans was at the time of the said discounts insolvent, or knew himself to be so. Nor is there any averment that the discounting of the notes was disapproved by the board of directors, or that the matter was fraudulently concealed from them. Nor is there any averment that the discounting of the notes was a mere device to obtain credit by one unworthy of it. Nor is there any averment that at the time the defendant was in debt to the bank. *Non constat* that his credit was not excellent. All of the acts described are natural and legitimate, and entirely consistent with innocence.

It is well settled as a matter of business practice in every large and active bank in financial centres

such as New York, Philadelphia, Boston, Chicago, St. Louis, or New Orleans, that it is impossible to conduct the affairs of a banking institution, so far as the discounting of paper, the making of loans, and the extension of business accommodations are concerned, through boards of directors. The demands for money are frequent and immediate, requiring prompt action, and cannot be conducted successfully if a submission to a board of directors is required before a merchant in need of funds can secure a loan. The discounting of paper, either through the board of directors in small banks in small towns in rural districts, or through the recognized business organs of a bank—the president or cashier—in large financial centres, is a legitimate business transaction to which no imputation of crime is to be attached unless it be specifically charged that it was compassed by such means as to render it criminal. It is usual to report all loans previously made by the president or cashier to the board of directors at some subsequent meeting. There is no averment that this was not done, or that they disapproved of the discounts of the defendants' notes.

Upon this feature of the case the Supreme Court of the United States, in United States *vs.* Britton (108 U. S., 193, decided in 1882), through Mr. Justice Woods, held distinctly that it was not an offense under section 5209 of the Revised Statutes, which forbade the willful misapplication of the moneys of a national banking association by the president of the bank, for

such officer to procure the discount by the bank of a note which was not well secured, and of which both maker and indorser were, to the knowledge of the president, insolvent when the note was discounted, and to apply the proceeds of the discount to his own use. Upon this point the learned justice used these words:—

"*Assuming that the maker of the note, being the defendant in this case, the gravamen of the charge is that the defendant, being president and a director of the association, and being insolvent, procured to be discounted his own note, the same not being well secured, the payee and indorser thereof being also insolvent, which he, the defendant, well knew. The incriminating facts are that the note was not well secured, and that both the maker and indorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question is, therefore, presented whether the procuring of the discount of such a note by an officer of the association is a willful misapplication of its moneys within the meaning of the law. We are clearly of opinion that it is not. It is not even, necessarily, a fraud on the association.*

"*One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by the board of directors or duly authorized officers or agents.* (Section 5136 Rev. Stat.) *There is no provision of the statute which forbids the discounting of a note not well secured, of both the maker and indorser of which are insolvent.*

*It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note if they see fit, and it might, under certain circumstances, tend to the advantage of the association. * * * It is not alleged that the discount was procured by any fraudulent means. From all that appears the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts, in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of its discount.*

"But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes would be a willful misapplication of the funds of the bank and subject him to a criminal prosecution. The count under consideration charges nothing more than this against the defendant. We are of the opinion, therefore, that it does not charge an offense under section 5209 of the Revised Statutes."

Can anything be more directly in point? Refer-

ring to Mr. Justice Wood's statement that there is no provision of the statute which forbids the discounting of a note not well secured, it may be added that a charge made months or years subsequent to the transaction, that a note was unsecured when it was discounted, is likely to be pure assumption and absolutely untrue, the facts and circumstances attending the transaction being unknown to the accuser. Many borrowers in excellent credit in January of the present year were bankrupt in August, and their paper absolutely unsalable. Again, banks frequently hold general collateral not referred to by the notes or even recorded on the books of the bank. Moreover, the practice of national banks in loaning money on a single name without an indorser, and without any collateral whatever, is well known. The report of the Comptroller of the Currency for 1892, page 152, shows that on September 30th, 1892, these banks held an aggregate amount of such paper of $320,000,000.

SURRENDER OF NOTES.—As to Counts 14, 15, 16 (printed record, case 15,300, pages 21–24), and 8, 9, and 10 (printed record, case 15,999, pages 7–9), it is urged that they are defective, because there is no averment that the defendant did not receive the notes as agent for collection, or to secure their renewal, and subsequently failed to account for the same to the Spring Garden National Bank either as to proceeds or renewal, and further because there is

no averment that the bank did not, either at the time of surrender, or at any subsequent time, secure value or renewal notes therefor, and further because there is no averment that the bank has been in any manner a loser thereby.

It is to be carefully observed that there is no charge whatever in this indictment that the defendant *abstracted* said notes, or that he embezzled the proceeds, and it is submitted that the mere charge of misapplication, these words having no fixed technical meaning, are not in themselves sufficient, in the absence of the averments which we have just referred to, to fix upon him any sufficient charge of crime.

Overdrafts.—Counts 21, 22 (printed record, case 15,300, pages 26, 27), 39, 42, 50, 51, 54, 57, 61, 64, 70, 71, 72, 75, 77, 80, 82, 83, 85, 86, 87, 88, 105, 108, 116, 117, 120, 123, 127, 130, 136, 137, 138, 141, 143, 146, 148, 149, 151, 152 (printed record, case 15,300, pages 27–72 inclusive), and 81, 82, 99, 102, 110, 111, 114, 117, 121, 124, 130, 131, 132, 135, 137, 140, 142, 143, 145, 146 (printed record, case 15,999, pages 12–38 inclusive), it is urged are defective, because there is no averment that the overdrafts complained of were not according to the usual and customary course of banking, or contrary to the practice and contract between the defendant and the Spring Garden National Bank, or that he was insolvent or in bad credit. Nor is there any allegation that they were not loans, and that interest was not charged thereon, or that

they have not since been paid, and that the bank is a loser thereby. No presumption of guilt should be drawn from the fact of an overdraft. No act of Congress makes an overdraft a crime. As a matter of fact overdrafts are matters of daily occurrence. The report of the Comptroller of the Currency for the year 1891 shows an aggregate of overdrafts in the country of $14,000,000, and for the year 1892 (report, page 128) in a classification of the assets of national banks at five different dates, shows overdrafts varying from $13,000,000 to $19,000,000. Clearly an overdraft is not a crime *per se*.

The president and directors of a national bank are required by the National Banking Act, to make a report five times a year to the Comptroller of the Currency of the condition of their bank. And upon the printed schedule of assets furnished by the Comptroller as a blank to be filled up by the proper financial officer, the very second item of assets is that of "Overdrafts," subdivided into those "Secured" and "Unsecured." The analysis of the general report of the Comptroller, as shown in the second volume of his report, shows that in the West and in the South overdrafts constitute a very common form of loan, and it is a well known and common business practice in New York, particularly with those who require large sums of money constantly and frequently in their business operations, to place in the hands of the president or cashier of a bank a bundle of securities to be used as

general collateral for any and all indebtedness, present or future, which the depositor may incur with the bank for loans or accommodations, irrespective of the condition of his cash account with the institution. Therefore it can scarcely be contended that what is recognized as a common and legitimate business practice in the West and Southwest, although, perhaps, condemned as bad banking method according to the more prudent and conservative policy of the older banks, both in Philadelphia and in New York, ought to be stigmatized as a crime in Philadelphia when recognized in St. Louis, New Orleans, or Chicago as legitimate business. The commission of crime under an Act of Congress cannot depend upon the geographical residence of the defendant. The act must be recognized *everywhere* as either criminal or innocent. There can be no crime created by construction depending upon the varying views of judges widely separated. It must be specifically defined. If it is not defined it does not legally exist. There must be something more in the charge of an offense than the bald description of it given in these counts of the indictments which are herein objected to. In a most interesting and able article in the *Forum* for September, 1893, entitled "The Scotch Banks, their Branches and Cash Credits," there is a review by Mr. A. S. Michie of the system of overdrafts. Mr. Michie is the president of the Royal Bank of Scotland, and is eminent as an expert authority on financial matters. He says :—

"Next in point of magnitude probably come the cash credit accounts, and as this form of advance has always been a unique feature of Scottish banking, it will be advisable to devote a few words to the subject. The system was originally designed by the directors of the Royal Bank so long ago as 1728, primarily, to promote the development of trade, and, secondarily, the circulation of their notes, which was a matter of some consequence in the days of free issues. The directors of that bank were evidently timorous as to their new device, for they minuted several resolutions about it and hedged it around with every safeguard. But the fact that one bank after another adopted the system, and that it prevails to the present day, and the further fact that under it losses have very rarely arisen, prove the soundness of the principle and the sagacity of those old-time bankers. The system is very simple, and is especially adapted to the needs of a man in business who has money coming in day by day. Such a man may be well-to-do and able to give security (readily marketable securities are of course preferred) for the credit he desires; or he may be penniless, with no capital but his character, and be able to offer no security but the guarantee of two friends. In either case he goes to the bank and arranges a cash credit for a specific sum. When it is established by the banker, he may then check against it whenever it suits him. He may draw as little of it or as much of it as he pleases, but he must never exceed the maximum sum

arranged for. Interest is charged to him day by day only upon the sum of which he is found to have availed himself each day. The cash credit is of the nature of a permanent arrangement, and so long as confidence is maintained and everything works smoothly, it may, and often does, exist for years. The rate charged will average from four and one-half to five per cent., but it is manifest that such a rate, charged on fluctuating balances, may be, and it generally is, more favorable to the customer than would be a considerably lower rate charged upon a specific sum for a specific period.*

"It is not too much to say that the cash credit system has largely contributed to the wealth of Scotland. It has been the means of affording to many able and energetic but poor men the necessary funds wherewith to develop many of the natural resources of the country, and to create numerous industries now existing. It is a fact that a large proportion of the richest men of the day had the foundation of their fortunes laid either in their own or in previous generations through the instrumentality of this simple system. And the same process is still going on. Many men throughout the country, with the aid of money so borrowed on the personal security of two or more friends,

* A system of limited "overdrafts," as styled in the United States, protected by blanket collateral or personal security. These accounts would show a debit balance, much, if not all the time, with deposits and checks being constantly made; the borrower paying interest on the actual amount of each day's "overdraft," as we would call it.

are now building up splendid businesses which also must eventually lead to fortune."

It is urged also that Counts Nos. 70, 71 (printed record, Case 15,300, pages 36, 37), 86 (*ibid.*, page 45), 137 (*ibid.*, page 61), 138 (page 62), and 152 (page 71), and Nos. 131, 132 (printed record, Case 15,299, pages 26, 27), and 146 (*ibid.*, page 37), are defective, because there is an utter absence of averment that the orders or charges *against* the said Nelson F. Evans, which, on their face, as displayed in said counts, were drawn and signed by Francis W. Kennedy as president, were made with the knowledge or consent, or with the subsequent assent, of the defendant, or that he obtained or did obtain any moneys thereon through their means as a fraudulent trick or device. On the contrary they are charges against him, not drafts by him. How could there be loss or damage to the bank?

As to Counts 12, 13, 39, 42, 50, 57, 61, 64, 72, 75, 105, 108, 116, 123, 127, 130, 136, 141 (printed record, Case 15,300, pages 20, 21, 27, 29, 30, 33, 34, 35, 38, 39, 48, 50, 51, 52, 55, 56, 57, 58, 59, 60, 63, 64), and Nos. 99, 102, 110, 117, 121, 124, 130, 135 (printed record, Case 15,299, pages 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 29), it is urged also that there is a palpable repugnancy of averment on their face. The indorsements show that the drafts or checks were paid through the Clearing House. The averment is they were not paid. What explanation is there of this contradiction? The face of

the paper set forth as a means of misapplication, is negatived by the averment, but the paper relied on affirmatively shows no loss or damage to the bank. There is no independent averment of loss, and we urge as to these all that has been said previously in this brief.

As to Counts Nos. 21, 87–130 (printed record, Case 15,300, pages 26, 46, 58), and No. 81 (printed record, Case 15,299, pages 11, 12), it is urged that they are defective and bad upon the same grounds already stated as to overdrafts, extensions of credit, whether secured or unsecured, and especially because there is no averment of loss or damage to the bank. All that has been urged against the other counts are equally applicable to these. If they are bad, so are these.

In conclusion, we submit that the indictments pressed in this case are bad because they contain no specific or sufficient charge of crime under section 5209 of the Revised Statutes of the United States. Advantage of these defects was taken by demurrers prior to plea pleaded, and, although the demurrers were overruled, and the defendant required to plead and go to trial immediately thereafter, yet advantage is now sought to be taken by way of motion in arrest of judgment, and assignments of error to the action of the court therein, so as to prevent the entry of a final and binding judgment or sentence against the defendant. The manner in which the defendant was forced to trial on the very

day on which the demurrers were filed and overruled, effectually prevented the issuing of a writ of error before trial.

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of accusation. This is but a reaffirmation of the essential principles of the common law, and puts it beyond the power of either Congress or the courts to abrogate them. It follows that the effect of this provision begins with the statute declaring an offense, and as to it insures the general rule of the common law that it is not to be considered to embrace offenses which are not within its terms or intention. This means that the crime must in some way be declared by legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state. The surrender of notes, the discounting of notes, the overdraft of an account, the indebtedness of a director to a national bank, are not crimes denounced or defined by the Revised Statutes of the United States, and cannot be constructively created as distinct offenses unless Congress in plain terms so declares. When it is sought by indirection to give them a criminal aspect, and to weave them into a general charge of willful misapplication of the funds or credits of a national bank, it is submitted that there must be upon the face of the indictment itself, not only a

distinct statement of the means whereby the misapplication was sought to be made, but the means must be so stated as to show affirmatively and conclusively that the misapplication was an unlawful one. It is not sufficient that the pleader should state in an indictment merely the facts from which the offense can be implied, or only so many of the essential elements as in the ordinary experience of life might suggest all the other elements, but he must state in terms everything necessary to constitute a criminal act. There are no common-law offenses against Federal authority, and this statute itself employs language which is devoid of any technical significance. Although, ordinarily, an indictment charging a misdemeanor in the language of the statute, which declares an offense, is sufficient, yet this is not universally true. It does not excuse the prosecutor from setting out every essential element constituting the offense. In order to inform properly the accused of the nature and cause of the accusation, within the meaning of the Constitution and the rules of the common law, it is plain that there must be not only all the elements of the offense stated in the indictment, but that they must be stated with clearness and certainty, and with such a degree of particularity as to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive full information to enable him to reasonably understand not only the nature of the offense, but the particular

act or acts which he must be prepared to meet with his proof. When his liberty is at stake, he is not to be left so very scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts. So far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense, it is the duty of the prosecution to be explicit.

These rules are well expressed in United States *vs.* Cruikshank (92 U. S., 542), in which Mr. Justice Woods used the following language:—

"*In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged.*"

In The United States *vs.* Cook (17 Wallace, 168), Mr. Justice Clifford declared "*that no indictment is sufficient if it does not accurately or clearly allege all the ingredients of which the offense is composed,*"

It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the source. It must descend

to particulars. Archbold's Criminal Practice & Pleading, 291.

The object of an indictment is, *first*, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal as a protection against all further prosecution for the same cause; and, *second*, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction. For these reasons facts are to be stated, and conclusions of law can then be drawn. A crime is made up of acts and intent, and these must be set forth with reasonable particularity of time, place, and circumstance, and where the circumstances constitute, as in this case, the gist of the crime they must be so stated as to be incapable, if proved, of being explained on any other hypothesis than that of guilt.

Although section 1025 of the Revised Statutes provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in form which shall not tend to the prejudice of the defendant, yet it is submitted that this statute does not aid us much, because the question still remains what are matters of form. In the foregoing criticism of the indictments in this case we have endeavored to point out that the matters complained of are matters of substance. By disregarding them the defendant *is* prejudiced. Acts usual, ordinary, and harmless in themselves are sought to be converted into crimes

by an assumption that they are in themselves criminal acts, although not covered by the language of any statute. Where the liberties of the citizen are concerned it is wisest and safest for courts to adhere to well-known landmarks, and refuse to enter a field of conjecture where their only guides would be the varying individual judgments and the sometimes crude opinions of different judges. Mere judicial discretion is liable to run into oppression and injustice, most distasteful and dangerous, because most insidious.

J. LEVERING JONES,
HAMPTON L. CARSON,
RUFUS E. SHAPLEY,
For Nelson F. Evans, Plaintiff in Error.

October Term, 1893. Nos. 922, 923.

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IN THE

Supreme Court of the United States.

NELSON F. EVANS, Plaintiff in Error,
vs.
THE UNITED STATES.
RECORD CASE *No. 15,299.*

NELSON F. EVANS, Plaintiff in Error,
vs.
THE UNITED STATES.
RECORD CASE *No. 15,300.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

J. LEVERING JONES,
HAMPTON L. CARSON,
RUFUS E. SHAPLEY,
Counsel for Plaintiff in Error.

Allen Lane & Scott, Prs. Phila.

SUPPLEMENTAL BRIEF.

ANALYSIS OF INDICTMENT.

A hasty reading of the counts, presented to the consideration of this court upon this writ of error, might lead to the conclusion that the operations of the defendant were those of great magnitude and frequency. A careful analysis of the counts produces the result displayed in the annexed table.

It must be remembered that each charge is reiterated three times. First, there is a charge against the defendant himself; next, as to the same act, that he aided and abetted the president to do the same thing; and, third, that he aided and abetted the cashier to do the same thing. This is a triplication of counts, and results in swelling the aggregate of figures and transactions to an apparently monstrous excess. In point of fact, however, while the general counts charge a misapplication of the sum of $100,000, when we come to particulars we find that of alleged overdrafts between the dates of February 11th, 1891, and May 8th, 1891—a space of, say, three active business months—the overdrafts amount to $43,957.44, of which $18,354.15 were on their face paid through the Clearing House, reducing the balance to $25,603.29, or an extension of credit by the bank officers of about $8000 a month, certainly not an excessive sum for any man in active business, whose credit,

not being impeached, or in any way questioned in the indictment, must be considered to be good. Besides, there is no allegation of loss to the bank.

Besides, the sum total of these overdrafts is very misleading. It might well be that a man would start, say, at the beginning of a month with an overdraft of $500, and would make a deposit of $1000 the next day; the day after he might again overdraw to the extent of $500, and this course might be pursued to the end of the month. In point of fact, at the end of thirty days, so far as his account with the bank was concerned, he would only be in debt on the matter of overdraft $500; but if every check that he drew was treated as a separate overdraft, and the total result presented, as in this case, his overdrafts would amount during that time to about $8000.

During this time, in the matter of discounting notes, he obtained a discount only to the extent of $15,000. With regard to the notes surrendered to him, presumably for collection, as to which there is no charge that the bank failed to receive either renewal notes or the proceeds thereof, the amounts aggregate but $20,333.55.

Of alleged fictitious deposits the aggregate is $30,333.35, of which on their face $15,000 were paid through the Clearing House, reducing the sum to $15,333.35, as to which there is no allegation of loss to the bank.

The sum total of *charges* made *against* the *defendant's account*, by the order of the president, is

$2602.25, a sum which would about represent the interest on the various credits extended by the bank to the defendant, thus emphasizing the theory of loan.

These facts appear upon the face of the indictment itself, and rob the case of any features of aggravation.

Tabular Analysis of Indictment.

General Accounts.

$100,000 00	No bill of particulars.

Surrender of Notes.

$7,500 00	
7,833 35	
5,000 00	
$20,333 35	No averment of loss to bank.

Overdrafts.

$5,000 00	
7,603 17	
1,091 23	Paid through Clearing House.
1,000 00	" "
5,000 00	" "
5,563 25	" "
5,000 00	
1,000 00	Paid through Clearing House.
138 12	" "
301 67	" "
2,010 00	" "
2,250 00	" "
1,500 00	Total payments through Clearing House, $18,-
1,500 00	354.15.
1,500 00	
1,000 00	
2,500 00	
$43,957 44	No averment of loss.

Alleged Fictitious Deposits.

$15,333 35	
5,000 00	Paid through Clearing House.
10,000 00	" "
$30,333 35	No averment of loss.

Discounting Notes.

$15.000 00 No averment of loss.

Charges against Defendant's Account.

$1,683 50
516 25
502 50

$2,602 25 Probable interest on credits.

Charges against an account are clearly not fresh credits.

Dr. Wharton's Rules.

Dr. Wharton, in the last edition (the eighth) of Wharton's Criminal Pleading and Practice, Chapter III, title "Indictment," subsection 7, Statement of Offense, section 151, states with precision the following rules:—

Sec. 151. *The offense must be set forth with reasonable certainty.*

It is a general rule that the special matter of the whole offense should be set forth in the indictment with such certainty that the offense should judicially appear to the court. When special facts are an essential part of an offense they must be set out. Thus in indictments for murder or manslaughter, it is necessary to state that death ensued in consequence of the act of the prisoner. In perjury, it is necessary to set out that the oath taken was one taken in a judicial proceeding or before a proper magistrate. Certainty to a common intent is required."

SEC. 152. *Omission of essential incidents is fatal.*

"We may hold it to be a general rule that where the act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which the illegality consists. Hence the omission of any fact or circumstance necessary to constitute the offense will be fatal.

SEC. 153. *Terms must be technically exact.*

"Not only must all the circumstances essential to the offense be averred, but these averments must be so shaped as to include the legal characteristics of the offense.

SEC. 154. *Not enough to charge a conclusion of law.*

"As the indictment must contain a specific description of the offense it is not enough to state a mere conclusion of law. Thus it would be insufficient to charge the defendant with 'stealing' or 'murder,' so it is bad to accuse him of being a common defamer, vexer, or oppressor of many men, or a common disturber of the peace, or a common forestaller, or a common thief, or a common evil doer, or a common champertor, or a common conspirator, or any other such vague accusation. On the same reasoning in an indictment for obtaining money by false pretenses, it will not suffice to state that the defendant falsely pretended certain allegations, but it must also be stated by express averments what part of the representations were false, for otherwise the defendant will

not know to what offense the charge of falsehood is intended to apply."

Wharton's Criminal Law (8th ed.), section 1213.

"It is not sufficient generally to charge malicious mischief or malicious injury. The facts of the injury must be given. An indictment, on the same principle, charging a man with being a common cheat or defrauder is bad, and is not helped by an affirmation that by divers false pretenses and false tokens he cheated and defrauded divers good citizens of the State."

SEC. 159. *Assault may be sustained without specification of an object.*

"Where an assault is duly averred, then the intent with which this assault was committed is matter of surplusage and need not be proved to secure a conviction of the assault. Even an assault with intent need not specify the facts necessary to constitute an offense whose actual and complete shape was not at the time matured. Thus an indictment for an assault with the intent to steal without stating the goods or money intended to be stolen is good. Nor is it necessary to aver that the prosecutor had anything in his pocket to be stolen. In an indictment also for an assault with intent to murder, it is not necessary to state the instrument or the means made use of by the assailant to effectuate the murderous intent. So in an indictment for breaking and entering a dwelling-house with intent to commit rape, it need not be alleged that the de-

fendant 'then and there' intended to commit the rape, nor need the offense of rape be fully and technically set forth. The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment, though when an attempt is averred it is necessary that some act constituting such attempt (*e. g.*, an assault) should be laid.

"The attempt is not *per se* indictable, and needs extraneous facts to make it the subject of an indictment, while it is otherwise with an assault. In such cases the term 'feloniously' must ordinarily be used when the object is felonious." Cites Randolph *vs.* Commonwealth, 6 S. & R., 398; Clark's Case, 6 Grattan, 675; State *vs.* Wilson, 30 Conn., 503; adds in a foot-note: "See, as tending to a looser view, U. S. *vs.* Simmons, 96 U. S., 360."

SEC. 160. When an averment is descriptive it may so far enter into the designation of the offense that it must be specifically proved.

SEC. 161. Alternative statements are inadmissible. Thus it cannot be charged that a man forged or caused to be forged.

Clark's case was that of an indictment for an attempt to commit an offense, and it was said it ought to allege some act done by the defendant of such a

nature as to constitute an attempt to commit the offense mentioned in the indictment.

In the case of State *vs.* Wilson, Butler, J., said: "The mere intent to commit a crime which exists in the mind only, and has not induced and characterized an act, is not a punishable offense; and therefore an attempt necessarily includes the intent, and also an act of endeavor adapted and intended to effectuate the purpose, and both must be specifically alleged and proved.

In the case of Randolph *vs.* Commonwealth, 6 S. & R., 398, it was held that the indictment charging that A. with force and arms, &c., unlawfully and wickedly did attempt to pick the pocket of one B., with intent then and there feloniously to steal, take, and carry away the goods and chattels, moneys, and property of the said B., is too vague and uncertain to be supported. The court said, speaking through the lips of Chief Justice Tilghman, a most eminent and accomplished jurist: "It is said in support of this indictment that an attempt to commit a felony is a misdemeanor, and that there can be no attempt without an act. But if it be true that there can be no attempt without *an act*, why was not the act alleged in the indictment? If the defendant committed an assault with intent to commit a felony it should have been said so; and if he committed no assault it was not easily to be conceived what kind of an attempt he made. This mode of charging a thing *by way of argument and not directly will not do.* To say that a man made an

attempt is a very uncertain thing. We cannot pretend to say what it is that the man is charged with doing; and without knowing that we cannot determine whether what he did was an offense. There is no precedent in support of such an indictment, and it appears to the court to be too vague, too loose, too uncertain to be supported. We are therefore of opinion that the judgment should be reversed."

The Maverick Bank Case.

In the recent prosecutions instituted in the District Court of the United States in Massachusetts against Dana, French, and Potter, the directors and the president of the Maverick Bank, the demurrers to the indictment were all sustained by Judge Nelson, upon the ground that "from all that appeared in the indictments all the facts set forth might be true, and yet no offense be committed." Per Nelson, J.

One of the charges was that Dana, a director, did on the 8th of October, 1890, make certain false entries in the report to the Comptroller of the Currency of the condition of the affairs of the bank at the close of business on the second day of October, 1890, with the intent then and there to injure and defraud the bank, and to deceive an agent appointed to examine the bank. We now quote from the opinion of the court:—

"In all the subsequent averments no dates are given except by the use of the words 'then and there.' Assuming that the words 'then and there,'

in the clause charging the intent to injure, defraud, and deceive, refer to the date immediately preceding it, October 2d, then the allegation is plainly insufficient in not alleging that the wrongful intention accompanied the act of making the entry, which it is stated was made on October 8th. If the words refer to the first date given, October 8th, the words 'then and there,' used subsequently, must necessarily refer to that date. If such is the meaning, there is a complete failure to aver that the entries were false in respect to the condition of the affairs of the bank at the close of business on October 2d, which is the essential thing to be established."

Dr. Wharton's Rules as to a Videlicet.

This is in line with what Dr. Wharton, in his work on Criminal Pleading and Practice, has said concerning the use of a *videlicet* in sections 122 and 131. He declares that the word is used tentatively, without binding the pleader to it as a matter of essential description, a variance in respect to which would be fatal. "It seems," said he, though the authorities differ in England, "that the *videlicet* could, if repugnant, be stricken out as surplusage." But, he adds, when an allegation is material, accuracy in stating it cannot be dispensed with by thrusting it into a *videlicet*. He states also that where two distinct days are averred the indictment is bad.

In section 131 he states when the time has been once named with certainty it is afterwards sufficient

to refer to it by the words "then and there." If these words precede every material allegation it is sufficient, though these words may not precede the conclusions drawn from the facts; but "then and there" have been held to relate to the day and place first stated, and not to a *noctanter*.

SEC. 133. "If two times or places have been previously mentioned, and afterwards comes the reference 'then and there,' or if the antecedent averment is in any way ambiguous as to time or place, the indictment is defective, because it is uncertain to which it refers. If the fact be stated as to time or place with ambiguity or uncertainty the indictment will be bad."

It will be observed that in all the counts in this indictment, without exception, the first date is stated under a *videlicet*—"heretofore, to wit, on the eighth day of May, 1891," the said Evans being *then* and *there* a director of a certain bank *then* and *there* known and designated, which bank was *then* and *there* carrying on a banking business in Philadelphia, did knowingly, unlawfully, fraudulently, and willfully, and with intent to injure and defraud the said bank, misapply certain of the moneys, funds, and credits of the said bank for his own use, benefit, and advantage, to wit, the sum of $15,333.35, in the manner and by the means following; that is, he, the said Evans, being *then* and *there* a director, as aforesaid, did *then* and *there* deposit and *cause* to *be deposited* and placed to his credit a certain check or order as follows (here follows a description

of the check dated March 17th, 1891), the said sum of $15,333.35 being in excess of all the sums and amounts which he, the said Evans, was then and there entitled to draw from the Keystone Bank, as he, the said Evans, *then* and *there* well knew, which said check or order was not paid by the said Keystone Bank, and by means of which said check or order so received the said Evans did *then* and *there* obtain the full credit on the books of the said Spring Garden Bank, and was thereby enabled to, and did, *to wit, upon the day and year aforesaid*, draw out of and obtain from the said bank the sum of $15,333.35 for his own use, benefit, and advantage, as he, the said Evans, *then* and *there* well knew, &c.

Now apply the rule, laid down by Judge Nelson in the Maverick Bank case, that the words "then and there," in the clause charging the intent to injure and defraud, refer to the date immediately preceding them, and it is clear that the allegation of the intent to defraud, which is a substantive part of the offense, refers to the eighth day of May, 1891. This date, by constant repetition without a *videlicet*, has become a substantial part of the description of the offense. The introduction as evidence, in support of a charge of an intent to defraud on the eighth day of May, 1891, of a check drawn on the 17th of March, 1891, and the confused and indistinct references to these two repugnant dates, by the words "then and there" and the words "upon the day and year aforesaid," involve us in contradictory

averments. If it be material to show that the intent to defraud existed upon the day designated as the eighth day of May, 1891, then it is quite clear that that cannot be supported by evidence of a check drawn upon the seventeenth day of March, 1891. Or, if the 17th of March, 1891, be considered as the important and substantial date, then there is no averment that the intent to defraud accompanied the drawing of the check dated March 17th, 1891. The averment that it was drawn on the day "*then* and *there*," or "the day and year aforesaid," is so obscure in its allusions as to create a doubt in the mind as to whether the act is charged to have been done upon the 8th of May or the 17th of March. Now, clearly it is of the utmost importance that there should be no doubt as to what was intended here. It might well be that a bank solvent at one date might be insolvent at another, or that a man's account in business would fluctuate from time to time. In preparing for his defense it would be necessary to show the exact condition of his account upon a certain day designated. This would be necessary in order that he might be fully prepared with evidence to meet a charge of misapplication. Which date must he select? Ought he to be prepared on both? If so, the count is bad for duplicity. If he be in doubt as to which one he is expected to reach, the count is bad for uncertainty; in other words, the repugnancy between the dates as laid in each count of the indictment is such as to make

the indictment uncertain, and clearly within Mr. Wharton's rule, that if two times or places have been previously mentioned, and afterwards there comes the reference "then and there," or if the antecedent reference is in any way ambiguous as to time or place, the indictment is defective, because it is uncertain to which it refers.

If, then, the allegation of an intent to defraud must accompany the words "willfully misapply," in in order to constitute a description of the offense intended to be established by section 5209 of the Revised Statutes; if it is also clear that under the rules, as laid down in Britton's case, it is absolutely essential that there must be a display of the means resorted to in accomplishing the misapplication, and, also, that those means shall be shown to be unlawful, then it follows that unless the allegation of the intent to defraud be coupled unquestionably, definitely, and distinctly in point of time with the act as laid of a certain day or date, the indictment is obnoxious to the charge of obscurity and indefiniteness. The defendant is not fully warned of the nature of the act which he is called on to answer, for uncertainty either as to time or place is equally as bad as uncertainty in the nature of the very act charged.

This vice runs through the entire indictment. We contend that although the eighth day of May is originally laid under a *videlicet*, yet by the use of the words "then and there," without resort to a *vide-*

licet, that which was originally unimportant becomes substantial and leading in character. Afterwards, in the introduction of the statement of the means resorted to (which statement is absolutely necessary in order to display the crime), a new and repugnant date is introduced, and subsequently the words "then and there" are again employed, and still later reference is made under a *videlicet* to the words "day and year aforesaid." It is impossible from this to extract any clear or definite idea whether the crime intended to be charged is charged as of the eighth day of May or as of the seventeenth day of March, 1891. Unless the defendant can be warned beforehand as to which day the prosecutor intends to introduce his proof, it is possible that he might come prepared to meet a charge at one time and be surprised by proof relating to an entirely different date, and thus be exposed to the peril of imperfect preparation owing to a misinterpretation of a vague, obscure, and indefinite charge.

It cannot be adjusted or corrected by argument, because, in the language of the Randolph case, "this method of charging by argument, and not directly, will not do."

In other words, there is a complete failure to aver that the intent to defraud existed as of the day and date of the 17th of March, 1891, when the check alleged to have been the means resorted to is dated. Unless this averment be coupled with the act, it is clear that it is insufficient under section 5209.

Turning again to the Maverick Bank cases: Judge Nelson pointed out, in sustaining the demurrers to the indictments, that there was no allegation in any one of the counts that the drawer of certain checks had no funds in the bank at the time of the certification of them by the bank officers. It will be observed that in the counts now under consideration there is no averment that at the time the check was drawn Mr. Evans had no funds in the Spring Garden Bank standing to his credit.

In disposing of the other counts Judge Nelson said: "There is the same fatal error in these as in the other indictments, in failing to allege with specific precision and certainty that the entry was false when made, and that the defendant then knew it was false." He closes with these words: "These indictments are expressed in terms so confused and contradictory, and are so stuffed with verbiage, repetitions, and surplusage, that it is next to impossible to conjecture upon what grounds it is expected to convict the defendants. To indictments drawn as these are the defendants ought not to be required to plead. The entry in all the cases will be demurrers sustained, indictment quashed."

This view of these authorities is confirmed by the still later case of United States *vs.* Hess, 124 U. S., 483, where Mr. Justice Field distinctly rules that in an indictment for committing an offense against a statute, the offense may be described in the general language of the Act, but the description must be ac

companied by a statement of all the particulars essential to constitute the offense or crime, and to acquaint the accused with what he must meet on trial. It was held that a count in an indictment under Revised Statutes, section 5480, which charged the defendant with having devised a scheme to defraud divers other persons to the jurors unknown, which scheme he intended to effectuate by inciting such other persons to open communication with him "by means of the Post Office establishment of the United States," and did unlawfully, in attempting to execute said scheme, receive from the post office a certain letter (setting it forth), addressed (setting it forth), against the peace, &c., does not sufficiently describe an offense within that section, because it does not state the particulars of the alleged scheme to defraud, such particulars being matters of substance and not of form, and their omission is not aided or cured by the verdict."

We respectfully submit that these views, taken in connection with our other brief, are sufficient to justify us in asking for a reversal.

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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

NELSON F. EVANS, PLAINTIFF IN error,
v.
THE UNITED STATES.
} Record case, No. 15299. 922

NELSON F. EVANS, PLAINTIFF IN error,
v.
THE UNITED STATES.
} Record case, No. 15300. 923

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

NELSON F. EVANS, PLAINTIFF IN error, v. THE UNITED STATES. } Record 15299.

NELSON F. EVANS, PLAINTIFF IN error, v. THE UNITED STATES. } Record 15300.

BRIEF FOR THE UNITED STATES.

These two causes are argued together, both arising from the same state of facts. We will endeavor to follow the order of arrangement adopted by appellant's counsel in their brief.

The first four counts in record No. 15300 are objected to on the ground that the charge that defendant did "willfully misapply the funds of the bank, with intent to defraud," is insufficient for lack of the further averments that the application was an unlawful one; that there was loss or damage to the bank, and that the means whereby said misapplication was made were unlawful.

In *United States* v. *Britton* (107 U. S., 666) the indictment charged that defendant did willfully misapply the funds of the bank in purchasing shares of its capital stock for the use of the bank. It was held that the words "willfully misapplied" in the statute meant misapplied for the use of the defendant, or of someone else than the bank, and that the application of the funds to the purchase of the stock held for the use of the bank was repugnant to the idea and charge of crime, and constituted only a maladministration of the affairs of the bank, and that there should be averments to show how the application was made and that it was an unlawful one.

In the four counts, here referred to, it is distinctly charged that the willful misapplication of the funds of the bank was made with the intent to injure and defraud the said bank, and that it was made for the use, benefit, and advantage of the defendant, Evans. This disposes of two of the grounds of objection in affording the averments omitted from the indictment in the Britton case.

A willful misapplication of a trust fund for the use and benefit of the trustee and to injure and defraud the beneficiaries of the trust, constitute, we submit, an adequate averment of a crime.

If instead of "misapplied" the term had been *appropriated* to his own use fraudulently and with intent to injure the owner, there could be no question as to this constituting a sufficient charge of crime. And so, if the term "had been applied to his own use" the effect would be the same. Here the term is *misapplied*, which simply

means wrongfully applied, as the term malapplied would convey the idea of a wrongful application with an evi intent.

Now the full charge of the counts is that the misapplication was made here fraudulently, with intent to injure, and for the use and benefit of the wrongdoer. This, we submit, is clearly sufficient as embodying every material element in the proper charge of a criminal offense. It states that the application of the fund was made to the injury of the bank and for the use of the wrongdoer, and was contrary to the act of Congress in such case made and provided, which expresses that it was *unlawful.*

Bank directors may apply the funds of the bank to their own use, and do so innocently; but when the charge is further made that this application was made fraudulently and willfully, and with intent to injure and defraud the bank, it excludes any possible conclusion or inference that it was a lawful, innocent, and proper act.

It is contended as to all of the special counts that they are defective, because that while attempting to display the means of the misapplication they do not show those means to be unlawful.

DEPOSIT OF CHECKS, OVERDRAFTS.

Counts 5, 10, *and* 11 *of No.* 15300.

These counts substantially charge that Evans, on the 8th of May, 1891, with intent to injure and defraud the bank, did knowingly, willfully, and fraudulently misapply certain funds of the bank for his own use and benefit, to wit: $15,333.35, in the manner and by the means follow-

ing: he, Evans, being a director, etc., did deposit and have placed to his credit in said bank his check, drawn by himself, on the Keystone Bank in favor of said Spring Garden Bank, the amount being in excess of all the sums and amounts which he, the said Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys of the funds of the said Keystone Bank, as he, the said Evans, then and there knew; and which said check was not paid by the said Keystone Bank, and by means of which check, so received and deposited, the said Evans did then and there obtain a false credit upon the books of the said Spring Garden Bank, and was thereby enabled to, and did, thereafter, upon the year and day aforesaid, draw out of and obtain from said bank the sum of $15,333.35, for his own use, benefit, and advantage, as he, the said Evans, then and there well knew.

(*a*) This was not a mere *overdraft*. The charge is that he knew that he had not the money to his credit in the Keystone Bank to meet his check; that he drew the check, procured the credit, and obtained the money for his own use, etc., with intent to injure and defraud the Spring Garden Bank.

It is the charge of the intent with which the act was done that prevents the transaction from being that of a mere overdraft and converts it into a crime. The charge that A took money from B is not the charge of a criminal offense, but that he took it with a fraudulent intention of injuring B and appropriating it to his own use, is the charge of stealing.

(*b*) The charge that the check on the Keystone Bank was in excess of all the sums and amounts which Evans

was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the Keystone Bank, as Evans well knew; and that the check was drawn with the intent of injuring the Spring Garden Bank, is a sufficient averment of crime. It matters not whether the Keystone Bank would have loaned Evans the money to meet this check or not, the charge is that on the day on which this check was drawn and given, the Keystone Bank did not pay it.

(*c*) It is immaterial whether the Keystone Bank refused to make payment of the check or declined to extend credit to Evans. It is enough that the court charges that the defendant gave the check, knowing at the time that he had no money in the bank on which it was drawn to meet it, and the check was not paid by the bank on which it was drawn.

Here, again, the crime consists in the fraudulent and criminal intent with which the act was done.

(*d*) It is charged that the act specified was done with the fraudulent intent to injure the Spring Garden Bank and for the use, etc., of defendant, and so, it could not have been done "in the regular course of business."

(*e*) It matters not what amount the defendant may have had to his credit in the Spring Garden Bank. The charge laid in the count is, that he endeavored to increase that amount by obtaining a false credit, in addition, by means of this check on the Keystone Bank, and that he actually did draw from the moneys of the Spring Garden Bank the amount of the check which he had fraudulently drawn on the Keystone Bank.

The misapplication consisted in the appropriation to the use of Evans of so much of the funds of the Spring Garden Bank as were applied to the payment of his fraudulent check.

(*f*) This is not an action for damages or a proceeding at the suit of the Spring Garden Bank, and hence it is immaterial whether that bank has sustained ultimate loss or not. Where one steals money, he does not obtain immunity from punishment by making restitution after he is detected.

The offense charged in the count was the commission of a crime. The count states that with intent to defraud the bank, the defendant did, by the means stated, draw out of and obtain from said bank, $15,333 35, for his own use, benefit, and advantage.

Counts 6, 7, 8, 9, 12, *and* 13.

These counts charge that Evans drew checks, payable to himself or bearer, on the Keystone Bank, knowing at the time that he had no funds in that bank to meet those checks, and that he, being a director in the Spring Garden Bank, caused those checks to be placed to his credit in the books of that bank, and thereby obtained a false credit on said books; and did draw out and obtain from said bank for his own use and benefit the amount of said checks. Each of said checks was indorsed, "For deposit to the credit of Nelson F. Evans, received payment through the clearing house."

It is objected that the fact as stated, that payment of the checks was received through the clearing house, is

repugnant to the charge of crime. The crime consists, as clearly stated in the count, in obtaining by means of this false credit the money from the Spring Garden Bank. The fact that at the clearing house credit was given the Spring Garden Bank in the settlement of accounts and ascertainment of balances that take place there could not affect in anywise the crime that had already been committed by Evans; and it is very certain that any credit which was allowed the Spring Garden Bank as against the Keystone Bank, on account of this check, at the clearing house, must have been speedily removed when the crime was detected by the Keystone Bank.

DISCOUNTING NOTES.

Counts 20 (*Rec.* 15300) *and* 14 (*Rec.* 15299).

Here again it may be conceded that the mere extension of loans by discounts, or otherwise, by a bank to any of its directors, with or without security, may be only a maladministration of the the affairs of the bank, without evil or criminal intent. But the charge in these counts is that Evans did aid and abet Kennedy, who was the president of the bank, knowingly, willfully, and fraudently to misapply the funds of the bank for the use and benefit of Evans with the intent, in him, Evans, to injure and defraud the bank by receiving and discounting with the money of the bank a certain note drawn by him, Evans, for $15,000; the said Kennedy and Evans then and there well knowing that said note was not well secured, and which note was not paid at maturity, by reason whereof the said bank suffered the loss of $15,000.

Counsel seem to treat these counts of the indictment as though they were counts in a declaration in assumpsit, in which all the facts which form a contract between the parties must be set out. It is true the facts which constitute the offense must be stated, but in every criminal proceeding it is the intent with which those facts were done which determines the character of the transaction. It is not the killing of a man which violates the law, it is the mental state of the actor; that state can only be charged in general terms as willfully, fraudulently, maliciously, etc.

Here the acts of these two officers of the bank receive their character altogether from the intent with which they were done, and that intent is clearly stated in the count.

United States v. *Conant* (9 Cent. Law Journal, 129).
United States v. *Britton* (107 U. S. R., 655).
United States v. *Britton* (108 U. S. R., 193).

SURRENDER OF NOTES.

Counts 14, 15, 16 (*Rec.* 15300); *Counts* 8, 9, 10 (*Rec.* 15299).

These counts charge, in substance, that certain notes, drawn by one Nettleton, and discounted by said Spring Garden Bank, and held by said bank as part of its assets, was, by Kennedy, president of the bank, surrendered and delivered to Evans, the defendant here, without receiving anything therefor for said bank, but that this was done knowingly, unlawfully, and fraudulently to injure said bank; the objection urged to the count being that the delivery to Evans, by the president, of these notes is not

averred in the count not to have been to Evans as agent of the bank to secure their collection or renewal; or that he subsequently failed to account for same to the bank, or return, or secure value, or renewal notes therefor.

Here is a charge of misapplication, with a distinct averment of the manner, means, and intent with which it was effected.

OVERDRAFTS.

These counts all, in substance, charge that the defendant Evans, being a director in said bank, did draw out of and obtain therefrom the sums of money mentioned in the several counts, by means of and upon certain checks or orders made and drawn upon said bank by said Evans; each of said sums so drawn by him on said checks, being in excess of all the sums and amounts which he, the said Evans, was then and there entitled to draw and have paid out of the moneys and funds of said bank; he, the said Evans, then and there unlawfully, wickedly, and fraudulently devising and intending to defraud bank of said sums of money, although, as he, said Evans, then and there well knew, the said sums of money so drawn out and paid had not been deposited in said bank by him, and the repayment thereof to said bank was in no way secured; and that said Evans had no right and title to the same.

Of course overdrafts may be the results of accident, negligence, or design, without being criminal or fraudulent; but here any conclusion or inference of good faith and fair dealing in these transactions is excluded by the terms in which it is characterized in the indictment. *United States* v. *Fish*, 24 Fed. Rep., 585.

The various matters stated in the brief of appellant's counsel, under this head of overdrafts, as the subject of averments which should have been made in the counts to exclude the conclusion of innocence, we submit are matters which could appear properly only as grounds of defense affirmatively used and proven by defendant.

The count must negative all exceptions, limitations, and provisos prescribed by the statute, but, surely, under no system of pleading has it ever been required or permitted that an indictment should, in express terms, negative every possible ground of defense of which the defendant may avail himself. The indictment must state the facts from which the law infers crime. It should not state, as seems to be required by the brief of counsel here, the evidence on which the Government relies to maintain the prosecution.

We agree with counsel that in criminal pleadings and proceedings there should be a *modus in rebus*. We appear to differ, however, as to the *modus*.

HOLMES CONRAD,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

NELSON F. EVANS, PLAINTIFF IN error,
v.
THE UNITED STATES.
} Nos. 922 and 923.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

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THE UNITED STATES.
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

These two causes were argued and submitted, but the court ordered a reargument before a full bench, and indicated certain counts in the indictments to which it directed the attention of counsel and to which this brief will be confined.

The plaintiff in error was indicted for the violation of Section 5209 of the Revised Statutes, which provides:

> Every president, director, cashier, or teller, clerk, or agent, of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association * * * assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, * * * with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, * * *

> and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten.

The questions presented on this appeal arise on the demurrers to the several counts of the indictment, and it may be objected *in limine* to the brief filed for the plaintiff in error that it is open to the same objection that is urged on his behalf to these counts, to wit, that it is confined to very general statements of conclusions of law and is lacking in that specification of facts and indication of particular features of error which render the grounds of his objections more a matter of conjecture than of positive information.

No. 922.

Counts 8, 9, and 10:

These counts charge that Nelson F. Evans did knowingly, wilfully, unlawfully, and fraudulently aid and abet Harry H. Kennedy, cashier of the Spring Garden National Bank, to wilfully misapply certain moneys, funds, and credits of said bank for the use, benefit, and advantage of the said Evans, with intent in him, the said Evans, to injure and defraud said bank in this, that the said cashier, with intent to injure and defraud said bank, did unlawfully, fraudulently, and wilfully misapply certain moneys, funds, and credits of said bank as follows: A certain promissory note dated November 10, 1890, made and drawn by A. B. Nettleton, for $7,500, due March 13,

1891, had been theretofore discounted by said bank and was then overdue and unpaid and was held by said bank as and for funds and credits as aforesaid.

Whereupon said Kennedy, cashier, with intent to injure and defraud the bank, did willfully, unlawfully, and fraudulently misapply the same, in that he then and there surrendered and delivered the same to the said Evans without receiving therefor, for the said bank, the said sum of $7,500, or any part thereof.

The three counts are alike, except as to names, dates, and amounts.

To the action of the court in overruling the demurrer to these counts, it is assigned as ground of error that the counts were defective in this:

1. That there was no averment that the defendant did not receive said notes as an agent for collection or to secure their renewal and subsequently failed to account for the same to the Spring Garden National Bank, either as to proceeds or renewals.

2. There was no averment that the bank did not, either at the time of surrender or at any subsequent time, receive security, value, or renewal notes therefor.

3. There was no averment that the bank had been in any manner a loser thereby.

To which we reply that it is averred that this asset of the bank was surrendered and delivered to the defendant for "his own use, benefit, and advantage." And that, of itself, is inconsistent with and repels the suggestion that he received it as agent, or upon any trust or confidence.

Again, it is averred that the cashier delivered it to him, and that he received it "with intent to injure and defraud

the bank." And this averment of the *intent* is the averment of a fact as material and substantial as the fact of the physical delivery and receipt of the note.

But beyond all this, in the statement of a criminal charge, it is essential and necessary only that the statement as made be inconsistent with any hypothesis of defendant's innocence, and that it presents a prima facie case of guilt.

It is not necessary or proper to negative facts which might constitute a ground of defense.

> As on the common law, so on the statute, the indictment need not negative what is mere matter of defense. (1 Bish. on Crim. Pro., sec. 638.)
>
> "In general," says Chitty, "all matters of defense must come from the defendant and need not be anticipated or stated by the prosecution." (1 Chitty, Crim. Law, 231.)
>
> Even where statute defining an offense contains an exception, if the language of the section defining the offense is so entirely separable from the exception, that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. (*United States* v. *Cook*, 17 Wall., 173 *et seq.*)

In this count it is manifest that the ingredients of the offense are fully and clearly stated and the matter which it is objected should have been negatived in the count is not the subject of any exception in the statute and is plainly a matter of defense only.

It is true that there is no averment in the count as to any security received by the bank from the defendant nor as to any ultimate loss by the bank, in consequence of the cashier's misapplication of its funds. It is, however, expressly charged in the count that the cashier surrendered and delivered the notes without receiving in whole or part consideration therefor, and this completely negatives the suggestion of security, value, or renewal notes being received by him from the defendant.

A count charging that one did steal, take, and carry away a horse would be open to suspicion from a further averment that the accused did not take it upon a trust, or give security for its return, or that the owner did not eventually recover him.

The crime, we submit, consists in the original wrongful act done with criminal intent; and its character and intensity is in no wise affected by the remorse, repentance, and reparation of the accused, or by the question of the ultimate loss by the owner. The thief may have returned the horse, or it may have been recovered from him in a civil action, without cleansing the accused from the stain of the offense or securing him from its penal consequences.

Count 14:

Charges Evans with aiding and abetting Kennedy, cashier, to willfully misapply the funds of the bank for the use, benefit, and advantage of Evans, in this, that said cashier did receive and discount with the funds of the bank a note made and drawn by Evans, payable at said bank, which note, when received and discounted, was not well secured, as the cashier and Evans then well knew, but

was so made and discounted with intent to injure and defraud the bank, was not paid at maturity or at any other time, and by reason of which transaction the bank suffered total loss.

To which count it is objected that it fails to aver that the said cashier acted in excess of his power, and that he was not the duly authorized officer of the bank to discount paper, that the discounts were procured by any fraudulent means, or that Evans at the time of said discounts was insolvent and knew himself to be so.

No averment as to the power of the cashier was necessary. As a matter of law the cashier had not the power to discount notes for a national bank. In 1 *Morse on Banks and Banking, 3d ed., sec.* 117, the law is thus stated:

> Thus the making of discounts is an inalienable function of the directors. They can not part with it or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it can not be taken out of the policy of the general principle, that powers of a public nature given by the legislature can not be sub-delegated. The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skillful conduct of which the prosperity of the institution and the safety of persons dealing with it depend. This duty they can not shift in whole or in part upon others, and it covers no department of banking business more unquestionably than the making of loans and discounts. (See, too, *Bank of United States* v. *Dunn*, 6 Pet., 60.)

Did the directors possess the power to confer such authority upon the cashier, and had he exercised it, in this case that would be affirmative matter of defense to be set up by the accused.

I know not how the fraudulent means by which this discount was procured could be more clearly and strongly averred than by the language employed in this count where it is charged that the cashier and the accused "did knowingly, unlawfully, fraudulently, and willfully, and with intent to injure and defraud the said national bank for the use, benefit, and advantage of Evans, discount a note which they knew to be unsecured and which has not been paid."

In *United States* v. *Britton* (108 U. S., 193) the charge was that Britton, being president and a director of the national bank, "did cause and procure to be discounted by said association a promissory note, etc., that said note when discounted was not well secured, that the maker and indorser were each insolvent, as he, the said Britton, president, etc., well knew." This was held not to be an offense under section 5209, Revised Statutes, because, as stated in the opinion of the court (p. 197), "*it is not alleged that the discount was procured by any fraudulent means.*"

But here that charge is distinctly made. The averment of the act is accompanied by the averment of the fraudulent intent which characterizes the act. The object was to obtain the money of the bank without a consideration therefor. The intent was to injure and defraud the bank. The means adopted was the form of discounting an unse-

cured note through the cashier of the bank, whose official power afforded the opportunity. The recipient of the misapplied fund was the defendant, who aided and abetted the cashier, and for whose use and benefit the act was done.

That Evans, the defendant, was solvent or insolvent at the time of said discount is wholly irrelevant and immaterial. The offense may have been committed as well by a millionaire as by a pauper. The averment of the count is that the bank sustained total loss, and that the note was unsecured when discounted and that all the parties knew it.

IN THE SECOND SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR the criticism is repeated of count 8 in No. 922, that there is not in that count and the others of the same class "a sufficient specification of the means resorted to to constitute an exhibition of an illegal act, such as would amount to a willful misapplication under section 5209.

And on p. 10 the count is said to be in substance "An act of aiding and abetting a cashier to willfully misapply the funds of a national bank by simply receiving from his hands an overdue note belonging to the bank, without giving value for it." And it is said that there is no charge in this count of any embezzlement or abstraction. This view excludes from consideration the very material feature, that a crime consists of an act done and the intent with which that act was done.

To charge that one did cut and wound another with a knife, from which wounds the man died, is no charge of murder. Or, that one took the goods of another and carried them off is no charge of theft. But the intent to kill

in the one case and to steal in the other are as essential elements of the crime as are the acts which the intent does characterize.

The learned counsel would strip from this transaction its flesh, destroy its form and color and the features which individualize it; and presenting it in its bare anatomy of bones, insist that its portraiture is not correctly drawn in the count. It is true that the language of the statute does not suffice to define the charge in the count. It is true that every necessary ingredient of the offense must be presented in the picture; and it is also true that many cases beside the multitude cited by counsel in his brief can be referred to in which indictments have been quashed because of an inadequate averment of the offense charged. The canons of the law are clear, distinct, and well known.

The precedents in the books of form and practice are infinite in number. But the practical question presented upon this demurrer is: Do these count adequately and properly charge all the necessary ingredients of this offense? Are they drawn in accordance with the requirements of the law and in conformity with the precedents? It charges that the cashier did willfully misapply the funds of the bank for the use and benefit of the plaintiff in error, with intent to injure and defraud the bank; and that he did this by taking a certain note, which was the property and an asset of his bank, and surrendering and delivering the same to the plaintiff in error without receiving therefor the amount of said note or any part of it.

Now, admitting that in this count there are employed no technical terms, no symbolic words freighted with a

fixed and adjudicated significance; but the charge is couched in simple and homely speech, but adequate to convey the meaning that the officer in charge of the assets of a bank, with an intent to injure and defraud the bank, and for the use, benefit, and advantage of a friend, took a bag of gold, the assets of the bank, and delivered it to his friend, without receiving for the bank anything therefor.

Is not here the taking, the felonious intent, the object had in view, and the actual wilful misapplication? Is there one single ingredient of this offense omitted from the statement in the count?

What boots it if the words "surrender and delivery" are not employed here with the nice refinements of philological discrimination? They "may not be as deep as a well or as broad as a church door, but they are enough."

As said by Mr. Justice Woods, in *United States* v. *Britton* (107 U. S., 665), these objections—

> are refined and unsubstantial, and not sustained by the rules of criminal pleading in cases of misdemeanor, or by the fair construction of the statute on which the indictment is based. These counts embody the language of the statute; they charge every element of the offense created by the statute with sufficient certainty to give the defendant clear notice of the charge he is called on to defend. They are, therefore, sufficient.

And in this same case, on p. 666, this court has defined "willful misapplication" as used in the statute. It says:

> We think the willful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some

> company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use, or the use of some one else, of the money and funds of the association by the party charged.

In the Britton Case that essential element of the offense was not averred in the counts. But in this case the averment is distinctly made that the willful misapplication was for the use, benefit, and advantage of the plaintiff in error.

In the Britton Case, after stating that the words "willfully misapplied" have no settled technical meaning in the law, and do not of themselves fully and clearly set forth every element of the offense charged, it is said:

> There must be averments to show how the application was made and that it was an unlawful one.

The count here charges that the misapplication was made by delivering to a stranger an asset of the bank without any consideration therefor, but for the use, benefit, and advantage of the stranger alone, and with the intent to injure and defraud the bank.

Now, if by phonograph and photograph every sound and act that occurred in the course of this transaction were presented to the court, it might still be, as counsel now objects that it is, "colorless." He says (p. 13), "It is neither moral nor immoral; it is not charged to be larceny, embezzlement, or abstraction." True. It is the ingredient of intent, motive, purpose, that imparts color and character to the transaction, and these are aptly and fully charged.

Count 14 in No. 923:

It is objected to this count that it charges no more than "that a stranger has had discounted a note which was not well secured or paid at maturity." And it is asked, "How can this be a criminal act?" The act described in those terms can not be a criminal act; but that is not the act charged in the count.

Throughout this brief and its predecessors in this case, it is insisted that a fraudulent act must be charged in terms which plainly disclose the fraud, without resorting to such phrases as "with intent to injure and defraud," which words, it is said, have been held in Massachusetts "do not enlarge the significance of the language, which avers the facts necessary to be proved in order to constitute the offense."

We are at a loss to perceive how fraud can be charged by any language, which avers only "facts necessary to be proved in order to constitute the offense," unless intent be reckoned as one of such facts. Fraud is a metaphysical and not a physical entity. It is a quality and not a substance. It is a characteristic of the transaction which is the subject of investigation. It is a thing of the heart and not of the hand or the tongue. And while it may not "enlarge the significance of the language," the language and the thing which the language conveys, will be wholly colorless in the absence of terms to express the presence or absence of fraud.

The words "not being well secured" are not employed in the statute and have no fixed technical meaning. But their significance in this count is that this cashier, Ken-

nedy, with intent to injure and defraud his bank, for the use, benefit, and advantage of the plaintiff in error, bought from the plaintiff in error, for the use of his bank, a note for $15,000, for which he paid to the plaintiff in error $15,000 of the funds of the bank, which note the cashier and plaintiff in error well knew, when said note was received and discounted, was not well secured. And the count further alleges that no part of it has ever been paid.

A bank officer cannot be held criminally liable merely because he discounts for his bank unsecured, worthless, or forged paper. These are official acts, in the performance of which, if unduly negligent, he may be held liable civilly. But where it is alleged in the count that such paper was discounted by him, he well knowing at the time that it was unsecured, worthless, or forged, and that he did so discount it solely for the use, benefit, and advantage of his friend, and with the intent to injure and defraud the bank, then he is criminally liable, and the difference is produced by the appearance of the criminal intent, motive, and purpose with which the act was done.

The criminal character of the charge in no sense depends upon the success or failure of the fraudulent device. The cashier who robs his bank and afterwards makes restitution is just as guilty in the eye of the law as his less fortunate brother who has stolen but is unable to restore. The averment here, that the note was never paid, was not made as an ingredient of the offense, but rather as confirmatory proof thereof.

The learned counsel insists "the mere averment of an intent to defraud, uncoupled by fraudulent acts, does not give the defendant notice of the fact which he is to meet.

The charge of an intent is not sufficient if not followed by an averment that the bank was defrauded and that the misapplication was effected. Britton's Case rules this one."

True, the mere averment of a criminal intent can subject no one to human penalties; but equally exempt from such penalties would he be who was charged with the commission of any deed without the averment of a criminal intent. Counsel would find his ingenuity and fertility taxed to frame an indictment which would aptly and adequately charge the commission of a crime, without the use of terms which imparted to it a distinctive criminal intent and purpose. Count 37 in Britton's Case was condemned because it relied upon the terms "wilfully misapplied" as of themselves descriptive of the offense; and because, further, it failed to negative an express exception in the statute.

Count 5, No. 923.

Here, too, counsel insist (p. 29) that this count charges only that the plaintiff in error, being a director of said bank, obtained a false credit with said bank, against which he drew, by depositing a check drawn by him on another bank, in excess of what he knew to be his balance there, and which check was not paid.

A frantic effort is made (pp. 28 to 32) to escape the fangs of this count. The count itself seems to be plain enough. It charges that the plaintiff in error, who was a director of the bank, intending to injure and defraud the bank by misapplying its funds for his own use, benefit, and advantage, drew his check upon another bank for $15,333.35, and caused said check to be deposited to his

credit in the bank in which he was a director, and thereby obtained a credit for that amount in said bank, against which credit he drew his check, and thereby drew from the bank in which he was a director the full amount of the check so deposited; that the check so deposited by him was not paid when presented, because in excess of all amounts to his credit in the bank on which it was drawn.

Now, this transaction is charged in the count to have been made by the plaintiff in error with intent to injure and defraud the bank, and made, too, for his own use, benefit, and advantage alone. The significance of the averment that he was a director in the bank will be seen by reference to section 5147, Revised Statutes, which defines the duties and obligations of a director. And the error of counsel's view has heretofore been pointed out in *United States* v. *Warner*, 26 Fed. Rep., 616.

It is suggested that the check referred to in the count may not have been the usual ordinary check, but may have been something called a "memorandum check." Well, if it was such a check as that, the plaintiff in error should have relied upon that fact in a plea, and not in a demurrer.

The other matters referred to in the plaintiff's second supplemental brief have been elsewhere considered.

No. 923.

Counts 5, 6, 7, 8, 9, 10, and 11.

These counts aver that Evans, being a director of the Spring Garden National Bank, did unlawfully and knowingly, fraudulently and wilfully, and with intent to injure

and defraud said bank, misapply certain of the moneys, funds, and credits of said bank for his own use, benefit, and advantage in this: that he did deposit, and cause to be deposited and placed to his own credit, certain checks drawn by him on the Keystone National Bank and in favor of the Spring Garden National Bank, the amount of said checks being in excess of all the sums and amounts which he, the said Evans, was then and there entitled to draw, obtain from, and have paid out of the moneys and funds of the said Keystone National Bank, as he, the said Evans, then and there well knew; which checks were not paid by the Keystone National Bank, and by means of which checks the said Evans did then and there obtain a false credit upon the books of the said Spring Garden National Bank, and was thereby enabled to draw out of and obtain from said bank, and did so draw and obtain, the full amount of said checks for his own use, benefit, and advantage.

To this count it is objected—

(1) That it contained simply an averment of a willful misapplication of the funds of the bank with intent to defraud it without averring how such application was made, and that it was an unlawful one, and without specifying the means whereby such misapplication was made, and showing that they were unlawful.

The gravamen of the charge is, that the defendant being a director did, by means of his check on another bank, in which he knew he had no funds to his credit, draw from the bank in which he was a director, for his own use, benefit, etc., with intent to injure and defraud the bank in which he was a director.

'A director violates this clause if, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, he obtains money from it to which he has no right by means of his overdraft made with intent to defraud and converts the same to his own use in fraud of the bank. (*United States* v. *Warner*, 26 Fed. Rep., 616.)

And the fraud is the same if he obtains money from his own bank by means of a check drawn in its favor on another bank in which he knows he has no funds to his credit. (*United States* v. *Fish*, 24 Fed. Rep., 585; *United States* v. *Harper*, 33 Fed. Rep., 477; *United States* v. *Britton*, 107 U. S., 655.)

The means by which this misapplication was made are clearly averred to have been by a "false check" on a bank in which he had no money to his credit, as he well knew. His position as a director in the bank entitled him to and obtained for him, from the officers of the bank, a degree of confidence and credit which justified them in believing that the check which he presented to them was drawn against funds which he had to his credit in the bank upon which it was drawn. These means are distinctly charged to have been unlawful and fraudulent and the intent to be to injure and defraud the bank. Whether the bank so defrauded was ultimately a loser by the transaction or not cannot affect the charge.

The defendant obtained the money by a fraudulent device. The intent and purpose are alleged to have been fraudulent. This proceeding is not one of the bank against the defendant, but the prosecutor is the Govern-

ment of the United States, whose peace and dignity are alleged to have been violated, and whose broken law can not be healed by those means which may be sufficient to satisfy the civil demands of the bank.

In a civil action by the bank it might be necessary to aver that the check, by means of which the money was obtained from the bank which paid it, was duly presented to the bank upon which it was drawn and payment thereof demanded and refused; but it is not so in an indictment. The criminal act charged is in obtaining the money from one bank by means of a false check drawn upon another, and it is enough to aver that the check was not paid by the bank upon which it was drawn.

(2) No averment that the checks were not paid or that the indorsements thereon that they were paid through the clearing house were false.

The clearing house is a mere convenience, established to facilitate the business of the banks in their settlements of daily transactions.

The method is fully explained in 1 *Morse on Banking, section* 349.

The customers of a bank are not parties to the clearing-house rules and can not avail themselves of any violation of such regulations. No advantage whatever can be taken of the clearing-house rules. (*Manufacturers Nat. Bank* v. *Thompson*, 129 Mass., 438.)

Counts 14, 15, 16—

Charge the defendant with aiding and abetting the president of the Spring Garden National Bank with knowingly, willfully, and fraudulently misapplying the

monies of that bank, with intent to injure and defraud the bank, for the use, benefit, and advantage of the defendant, in procuring certain promissory notes, which had been discounted by said bank, and which were held by it as and for funds and credits of the bank, to be surrendered and delivered to the defendant without consideration for the use, benefit, and advantage of the defendant.

It is objected that these counts fail to aver that defendant did not receive said notes as agent for collection, or to secure their renewal, etc.

This ground has been considered heretofore and the answer suggested that such negative averments were proper matters of defense and form no part of the *prima facie* case presented by the counts.

Notes discounted and held by the bank constitute as substantial and valuable part of its assets as the cash in its vaults. And in a count which charged that the cashier had surrendered and delivered the cash to the accused for his own use and benefit, without consideration, to injure and defraud the bank, one would hardly expect to find the further averment that the cash so delivered was not delivered to the accused as agent for the bank.

Here facts are averred which constitute *prima facie* a willful and fraudulent misapplication of the funds of the bank by its cashier, and that the defendant aided and abetted in the commission of the offense. Nothing more need be averred. (*United States v. Warner*, 26 Fed. Rep., 616.)

The count does not aver that the bank did not receive security or value for the notes so surrendered. It does aver that notes for certain amounts were surrendered and

delivered by the cashier to the defendant without the bank, to which the notes belonged, receiving therefor the amount of said notes or any part thereof, which is in fact an averment that the surrender was without consideration, because any consideration must have been the equivalent in value of the amount of these notes or of some part thereof. The form of expression employed in the count is the same as without consideration in whole or in part. Count 20:

This count, with No. 16, charges the defendant with aiding and abetting Francis W. Kennedy, president of the Spring Garden Bank, to willfully misapply funds of the bank in the manner and by the means charged in those counts.

It is objected that the counts fail to aver that the president acted in excess of his power, or outside of his regular duty, or that he was not the duly authorized officer of the bank to discount the paper, or that the discounts were procured by fraudulent means, or that the defendant was insolvent.

All that has been hereinbefore said in support of the counts charging misconduct in the cashier applies *a fortiori* to those affecting the conduct of the president.

It has been shown that under the general law of banks and banking none but the directors have inherent power to discount notes with funds of the bank.

In certain cases this power has been conferred upon the ashier as the chief executive officer, but never without carefully defined limitations upon his power. (1 Morse on Banks, sec. 117.)

As to the president of a bank, he has no inherent power whatever over the property or assets of the bank, and the instances are rare in which any such power has been conferred upon him. (1 Morse on Banking, chap. 10, on the president.)

But we may say as to the president, as we have said as to the cashier, that if he acted in this case under any power specially conferred upon him, and that is relied on to repel the charge made in the count, it should have been set up for the accused as affirmative matter of defense.

In *United States* v. *Britton* (108 U. S., 197), the indictment was against Britton, who as president of the bank had procured to be discounted the note of himself indorsed by George F. Britton, the said note not being well secured, as both parties well knew. The demurrer to the count was sustained in that case because, as this court said, "it is not alleged that the discount was procured by any fraudulent means."

The count here is not open to that objection. The allegation of fraudulent means, which was omitted from the count in Britton's case, is clearly and unequivocally made here.

Passing now from the consideration of the specific counts, to which attention has been directed by the court, we may refer to some of the views presented by counsel for plaintiff in error in his original brief, upon some of the general characteristics which he insists are common to all the counts and are alike fatal to all.

On page 21 of his original brief he contends:

> That all of these counts are bad, because, while averring a willful misapplication, they wholly fail to

> aver that the application was an unlawful one, and because they fail to show that the means whereby said alleged misapplication was made were unlawful. Besides, there is no averment of loss or damage to the bank.

A casual reading of these counts discloses that the terms "unlawful" and "unlawfully" appear with dreary reiteration through all of them. With what felicity and nicety of discrimination they are distributed and applied may possibly be a legitimate subject of hypercriticism. But that everything that was done is alleged to have been willfully and unlawfully and fraudulently done, there can be no doubt. But, strictly speaking, it is not necessary to aver that the application was an unlawful one, but only necessary to state facts which show that the application was unlawful.

In *United States* v. *Britton* (107 U. S., 669) this court said:

> The words "willfully misapplied" are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word "embezzle," as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant "willfully misapplied" the funds of the association. There must be averments to show how the application was made and that it was an unlawful one.

Observe: It does not require, as the counsel assumes, that there must be an averment that the application was

an unlawful one; but the averments must be such as to show that it was unlawful. It is not necessary to aver the legal conclusions from the facts, but only to aver the facts which compel that conclusion.

"Willfully" has received abundant juridical construction to determine its significance.

In *Felton* v. *United States* (96 U. S., 702) this court said:

> Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of a thing but a determination with a bad intent to do it, or to omit doing it. The word "willfully," says Chief Justice Shaw, in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose (20 Pick., 220). It is frequently understood, says Bishop, as signifying an evil intent without justifiable excuse. (Crim. Law, vol. 1, sec. 428.)

"Misapply," says Stormonth in his dictionary, means "to apply to a wrong purpose." And so the word itself imports that the application was an unlawful one.

And so as to the means whereby said misapplication was made. These are in each count particularly set forth with time, place, and circumstance. The intent is alleged to have been to injure and defraud the bank for the use and benefit of the defendant. Obtaining money from one bank by means of his check on another bank in which he knew he had no funds to his credit. Procuring his unsecured note to be discounted with the funds of the bank by the president or cashier of that bank. Receiving, without consideration, from the president of a bank

part of the assets of that bank for his own use, benefit, and advantage. Obtaining money from the bank by overdrafts, and all this with intent to defraud the bank from which the assets and monies were obtained are criminal offenses which, when charged with time, place, and circumstance, do constitute willful misapplication of the funds of the bank.

A loan of the monies of a bank by its president, in bad faith, for the purpose of defrauding the bank, is no loan in the sense of the law. (*United States* v. *Fish*, 24 Fed. Rep., 585.)

> In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them, by virtue of a trust committed to him; he may abstract them from other funds of the bank unlawfully, and afterwards criminally misapply them. Or, by virtue of his official relation to the bank, he may have such control, direction, and power of management as to direct an application of the funds in such manner, and under such circumstances as to constitute the offense of willful misapplication. (*United States* v. *Northway*, 120 U. S., 332.)
>
> It is not necessary that the drawer of a bill should have funds in the hands of the drawee; and a check in such a case would be a fraud. (*Merchants' Bank* v. *State Bank*, 10 Wall., 647.)
>
> The rule is asserted with considerable rigor, for it is declared to be applicable, even though the drawer at the time of giving the check, not drawn against actual funds in the bank to his credit, nevertheless had reasonable cause to suppose it would be paid. (*Longhnan* v. *Barry*, 6 Irish Rep. Common Law, 457, cited in 1 Morse on Banks, sec. 359.)

And it is not necessary for the court to aver that the overdraft was made, or other act done, "not in the usual course of business." (*United States* v. *Britton*, 107 U. S., 662.)

It is undoubtedly true that all the facts which constitute the crime must be set forth in the count, and it is not sufficient to charge the crime in general terms, or trust to adjectives and adverbs to supply the omission of facts.

One can not be tried on an indictment which charges him simply with "murder," but which does not set forth with time, place, and circumstance all the facts, including the criminal intent, which constitute murder.

Precisely the same state of facts, with the averment of a criminal intent, will constitute crime, which, without such intent, would be reckoned no offense against the law.

HOLMES CONRAD,
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